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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,

Petitioner,

-against-

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act and its accompanying regulations require that a local public school district provide the services of a consultant teacher and a teaching aide to disabled students attending a non-public school on-site at the premises of the non-public school, when such students have been voluntarily enrolled there by their parents?

LIST OF PARTIES

The parties to the proceeding below are:

1. Petitioner, Board of Education of the Enlarged City School District of the City of Watervliet, New York.

2. Respondents, Colleen Russman, a child with disabilities, by her parents, Patricia and Paul Russman.

3. Defendant Thomas Sobol, as Commissioner of the New York State Education Department, was dismissed as a party-defendant to this action pursuant to an Order signed by Magistrate Judge Ralph W. Smith on May 11, 1994 and entered on May 12, 1994.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Board of Education of the Enlarged City School District of the City of Watervliet, New York, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 12, 1996 and affirmed by the mandate issued September 13, 1996, after the Second Circuit denied a petition for a rehearing en banc on August 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, pp. 1a-16a, *infra*) is reported at 85 F.3d 1050, 24 IDELR 274 (1996). The opinion of the United States District Court for the Northern District of New York (Appendix B, pp. 17a-29a, *infra*) is reported at 22 IDELR 1028 (1995). The opinion of United States Magistrate Judge of the United States District Court for the Northern District of New York, (Appendix D, pp. 32a-47a, *infra*) is reported at 22 IDELR 1 (1994). The administrative decision of the New York State Review Officer (Appendix E, pp. 48a-62a, *infra*) is reported at 22 IDELR 731 (1993).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit is dated June 12, 1996. The Order from the Second Circuit denying a petition for a rehearing en banc is dated August 19, 1996 and the mandate issued by that court in the above-entitled proceeding is dated September 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Individuals with Disabilities Education Act ("IDEA"), (20 U.S.C. §§1400 *et seq.*), provides in relevant part:

> Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall – . . . set forth policies and procedures to assure –
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

> (B) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring provision of special education and related services to all children with disabilities within such State; . . . (20 U.S.C. §1413(a)(4)).

2. The Assistance to States for the Education of Children with Disabilities (IDEA) Regulations, (34 C.F.R. Part 300), provide in relevant part:

> If a child with a disability has [a] F[ree]A[appropriate]P[ublic]E[ducation] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Secs. 300.450-300.452 [pertaining to Children With Disabilities Enrolled by their Parents in Private Schools]. (34 C.F.R. §300.403).

Also, a state educational agency must ensure that:

> To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services[,] (34 C.F.R. §300.451(a)); and

> The requirements of 34 C.F.R. Secs. 76.651-76.662 are met. (34 C.F.R. §300.451(b))
>
> Each L[ocal] E[ducational] A[gency] shall provide special education and related services to meet the needs of private school children with disabilities residing in the jurisdiction of the agency. (34 C.F.R. §300.452).

3. The Education Division General Administrative ("EDGAR") Regulations, (34 C.F.R. Part 76), provide in relevant part that with respect to the "Participation of Students Enrolled in Private Schools" in state-administered programs:

> A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in Sec. 76.652-76.662 and in the authorizing statute and implementing regulations for a program. (34 C.F.R. §76.651(a)(1)).
>
> The subgrantee shall provide the opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs . . . (34 C.F.R. §76.651(a)(2)).
>
> The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools. (34 C.F.R. §76.654(a)).

STATEMENT OF THE CASE

This case involves an issue of nationwide importance regarding the scope of a public school district's responsibility, under the Individuals with Disabilities Education Act, ("IDEA"), (20 U.S.C. §§1400 *et seq.*), and its accompanying regulations, (34 C.F.R. Part 300), to provide services to students with disabilities voluntarily enrolled by their parents in non-public schools. Colleen Russman, respondent herein, requested that petitioner, the Board of Education of the Enlarged City School District of the City of Watervliet, New York ("the District") provide her with on-site consultant teacher and teaching aide services within the premises of a parochial school. The U.S. Court of Appeals for the Second Circuit, in its decision below, determined that IDEA and its implementing regulations compelled the District to provide such services. Petitioner believes that this determination is erroneous. It misunderstands applicable law and regulations and is in direct conflict with the rulings of two other circuit courts of appeals. It is also contrary to the official position of the U.S. Secretary of Education and the U.S. Department of Education, the governmental official and entity responsible for overseeing the implementation of IDEA and its regulations, and for promulgating such regulations.

The facts in this case are as follows. Colleen is a student with mental retardation and physical disabilities who throughout this action has been a resident of the District. Prior to the 1991-1992 school year, Colleen attended and received services within the District's public schools with other disabled children. However, in May 1991, Colleen's parents asked the District's Committee on Special Education ("CSE") to consider the possibility of

integrating Colleen into a mainstream program for the 1991-1992 school year, preferably at St. Brigid's School, a private parochial school in Watervliet attended by Colleen's sisters. In response, the CSE recommended that Colleen be mainstreamed into an appropriate classroom and receive speech therapy and occupational therapy, as well as a full-time teaching aide and the services of a part-time consultant teacher. The District's board of education agreed that the CSE's proposal was appropriate, but refused to provide the services at St. Brigid's School. The board of education's refusal was based on its concern that providing such on-site services would violate the Establishment Clause of the First Amendment to the U.S. Constitution, as well as on its understanding that nothing in federal or state law required the District to provide on-site services. Colleen's parents sought administrative review of this determination. A State Review Officer subsequently annulled the CSE's recommendation based on procedural violations involved in the development of the 1991-1992 individualized education program ("IEP").

In May 1992, the District's CSE convened and developed an IEP for Colleen for the 1992-1993 school year. The 1992-1993 IEP again provided for Colleen's placement in a mainstreamed educational environment, with speech and occupational therapy and the services of a part-time consultant teacher and a full-time teaching aide. The part-time consultant teacher services consisted of one hour per day, including one-half hour of direct assistance in reading, mathematics and language arts, and the other half-hour of indirect consultation with the classroom teacher concerning test modification and classroom assignments of reading, English, spelling, penmanship, mathematics, social studies, science and health. The

consultant teacher services also included modification of the academic curriculum to make it appropriate for Colleen. On the other hand, the full-time teaching aide services consisted of direct support services to Colleen in reading, English, spelling, penmanship, mathematics, social studies, science, and health, in the classroom, to assist Colleen in understanding the material and focusing her attention to class activities, under the supervision of her teachers.

However, after considering alternative programs, the legal issues involved, and Colleen's experiences during the 1991-1992 school year, the CSE denied her parents' request that the IEP for 1992-1993 be implemented at St. Brigid's School. The District's board of education agreed with the CSE decision in all respects and Colleen's parents sought administrative review of this determination. An impartial hearing officer upheld the District's decision and a State Review Officer upheld the decision of the impartial hearing officer who had ruled in favor of the District.

Colleen, by her parents, then commenced this action in U.S. District Court alleging the denial of services at St. Brigid's violated the Individuals with Disabilities Education Act §1413, New York Education Law §3602-c[1], and

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[1] New York Education Law §3602-c, also known as the state's dual-enrollment law, pertains to the provision of publicly-funded special education, gifted, occupational and vocational services to students attending non-public schools within the state of New York. As interpreted by the New York State Court of Appeals in *Bd. of Ed. of the Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 NY2d 174 (1988), the statute permits public school districts to determine where dual-enrollment

the Free Exercise Clause of the First Amendment to the U.S. Constitution. In response, the District argued that the provision of services on-site at the parochial school is not mandated by either federal or state law and that requiring these services would be a violation of the Establishment Clause of the First Amendment to the U.S. Constitution. The parties cross-moved for summary judgment, and by Memorandum-Decision and Order, a U.S. Magistrate Judge granted summary judgment to the District, holding that the services sought by Colleen and her parents were not mandated by state or federal law, and, further, that the provision of said services would violate the Establishment Clause. (pp. 32a-47a, *infra*).

Colleen and her parents then appealed that decision to a U.S. District Judge, who reversed the Order of the Magistrate Judge, and in a Memorandum Decision ruled that IDEA and its accompanying regulations required the District to provide the requested services on-site at the parochial school Colleen's parents wish for her to attend. The District Judge further found no constitutional objection to providing such services at the parochial school. (pp. 17a-29a, *infra*). Thereafter, the District appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed the Order of the District Judge.

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services are to be provided. It does not require school districts to provide on-site dual-enrollment services on the premises of a non-public school. The issue of "[w]hether a school board might, as a matter of choice, offer certain services . . . without running afoul of the Establishment Clause," however, was not a question presented before the New York Court of Appeals in the *Wieder* case. (72 NY2d at 189).

Relying on this Court's decision in *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993), the Second Circuit ruled there is no constitutional impediment to the provision of consultant teacher and teaching aide services on-site within the premises of the parochial school Colleen's parents wish her to attend. It then proceeded to determine that IDEA and its accompanying regulations require that the District provide such on-site services.

According to the Second Circuit, IDEA and its accompanying regulations afford public school districts only limited discretion to deny students with disabilities voluntarily placed by their parents at non-public schools with on-site services at the premises of their non-public schools. In its view, public school districts may deny on-site services to non-public school students only where the cost of providing such services would exceed the cost of providing the same within the public schools. (pp. 1a-16a, *infra*). Petitioner's request for en banc review was denied. (pp. 65a-66a, *infra*).

Commencing with the 1992-1993 school year, and throughout the pendency of the administrative and court proceedings in this litigation, Colleen has received educational services in a mainstreamed integrated setting within the District's public schools, pursuant to an individualized education program developed by the District in consultation with Colleen's parents. Colleen's parents, have had no objection as to the nature or quality of these services, but only as to where the services have been provided.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Misunderstands Applicable Law and Regulations Governing a Public School District's Responsibility to Provide Services to Students with Disabilities Voluntarily Enrolled by their Parents at a Non-Public School.

The Individuals with Disabilities Education Act ("IDEA"), (20 U.S.C. §§1400 *et seq.*), is a federal statute designed to assist states and local public school districts in the education of children with disabilities. As such, grant awards authorized by Part B of the statute are contingent upon state and local school district assurances that a "free appropriate public education will be available for all children with disabilities." (20 U.S.C. §1412(2)(B)).

Parents, however, may refuse a public education for their children. Thus, IDEA and its accompanying regulations (34 C.F.R. Part 300) delineate separately the rights of students with disabilities voluntarily enrolled by their parents in non-public schools (20 U.S.C. §1413(a)(4)(A); 34 C.F.R. §§300.403, 300.450-300.452). As further discussed below, these rights are distinct not only from those of students receiving a public education, but also from those enjoyed by students enrolled in non-public schools by a state agency or local public school district when necessary programs and services are not readily available within the public schools themselves. (pp. 9a-12a, *infra*; 20 U.S.C. §1413(a)(4)(B); 34 C.F.R. §§300.400-300.403). Contrary to the determination of the Second Circuit, nothing within this statutory and regulatory scheme compels public school districts to provide students with disabilities voluntarily attending non-public schools with

on-site consultant teacher and teaching aide services on the premises of their non-public schools.

Because petitioner asserts that neither IDEA nor its accompanying regulations require it to provide the contested on-site consultant teacher and teaching aide services on the premises of a non-public school, petitioner will not address the constitutional issue of whether the provision of such services at a parochial school violates the Establishment Clause. In not addressing the constitutional issue, petitioner has deferred to this Court's pronouncement that " [i]t is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affilitated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984), citing *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979); *Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (concurring opinion); *Whalen v. United States*, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting)).

(a) The rationale of the court below – In ruling that IDEA and its accompanying regulations compel public school districts to provide on-site consultant teacher and teaching aide services to disabled students voluntarily attending non-public schools, (pp. 9a-16a, *infra*), the Second Circuit opined that public school districts enjoy very limited discretion to deny such services, "at least where differences in costs of provision do not exist." (pp. 13a, *infra*).

(b) Misunderstanding of applicable law and regulations – The Second Circuit's decision misunderstands IDEA's statutory and regulatory scheme. First, it is based not on the statutory language of IDEA itself but, rather, on its own singular interpretation of an isolated regulatory provision applicable to the implementation of IDEA. Second, the specific regulatory provision relied on by the Second Circuit, is just one of several provisions merely cross-referenced by the IDEA Regulations and found within the Education Division General Administrative Regulations, which are more commonly known as the EDGAR Regulations (34 C.F.R. Part 76), and generally applicable to state-administered federal programs. (pp. 9a, *infra*). Third, the various other EDGAR regulatory provisions additionally cross-referenced by the IDEA Regulations mirror the statutory language of IDEA itself and its regulations neither of which, as further discussed below, require that public school districts provide on-site services to students voluntarily attending non-public schools on the premises of the non-public schools. The applicable provisions of the IDEA Regulations themselves also track the statutory language, as well. Fourth, the Second Circuit's decision is in conflict with the official opposite position long-espoused by the U.S. Secretary of Education and the U.S. Department of Education on this issue. (pp. 11a-12a, *infra*).

(c) The statutory scheme – IDEA affords children with disabilities attending public schools the right to a "free appropriate public education" from the public school district where they reside. (20 U.S.C. §§1412(1), (2)(C), 1414(a)). A free appropriate public education under the statute consists of special education and related

services provided at public expense and in conformity with an individualized education program tailored to meet the unique needs of each individual child. (20 U.S.C. §§1401(18), 1414(a)(5); 34 C.F.R. §§300.341, 300.346).

The obligation of a public school district toward disabled children voluntarily enrolled by their parents in non-public schools, however, is different. While IDEA authorizes the provision of services for these children, it distinguishes between the rights of students with disabilities receiving an education under the auspices of public school authorities and those voluntarily placed by their parents in non-public schools. (20 U.S.C. §§1412(2)(B), 1413(a)(4)(A),(B)). Specifically, for instance, IDEA provides that public school districts are not required to pay for the education of non-public school students at any such school or facility. (20 U.S.C. §1413(a)(4)(B)(i)). It does provide, however, that non-public school students be given an opportunity to "participate" in IDEA programs "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools . . . " (20 U.S.C. §1413(a)(4)(A)).

By its plain language, the requirement that non-public school students be given an opportunity to participate in IDEA programs under conditions specified by the statute does not impose on public school districts an obligation to provide on-site consultant teacher and teaching aide services to disabled students voluntarily attending non-public schools. Moreover, and as further discussed below, the official interpretation of IDEA by the U.S. Secretary of Education and the U.S. Department of Education impose no such obligation either. Indeed, in

explaining the rights of disabled students attending non-public schools under IDEA, the governmental official and entity responsible for overseeing the implementation of the statute have long opined that such students are not even entitled to the full range of services available to students with disabilities attending public school.

The statutory distinction as to the rights of disabled students attending public school and those voluntarily enrolled by their parents in non-public schools is further marked by additional separate provisions pertaining to the rights of students with disabilities placed in private school by public school authorities, when public school authorities are unable to provide necessary programs and services themselves. The latter are afforded the same right to a free appropriate public education enjoyed by disabled students enrolled within the public schools. (20 U.S.C. §1413(a)(4)(B)).

(d) The regulatory scheme – With respect to disabled students voluntarily attending non-public schools, the IDEA Regulations, officially known as the Assistance to States for the Education of Children with Disabilities Program Regulations, (34 C.F.R. Part 300), parallel the requirements of IDEA itself. They provide that public school districts are not financially responsible for the education of such students at any such schools (34 C.F.R. §300.403). They also provide that students with disabilities voluntarily enrolled by their parents in non-public schools are to be allowed participation in IDEA programs "to the extent consistent with their number and location in the State . . . " (34 C.F.R. §300.451(a)). Nothing within the IDEA Regulations themselves entitle non-public

school students with disabilities to on-site services on the premises of their non-public schools.

The IDEA regulations cross-reference certain provisions of the EDGAR Regulations, mentioned above, which pertain specifically to the "Participation of Students Enrolled in Private Schools" in state-administered programs. (34 C.F.R. §§76.651-76.662, 300.451(b)). These provisions are not incongruous with the requirements of IDEA and the IDEA Regulations. They provide, for instance, that non-public school students are to be given "a genuine opportunity for equitable participation" in state-administered federal programs. (34 C.F.R. §76.651(a)(1)). In addition, the required opportunity for equitable participation is to be "consistent with the number of eligible private school students and their needs" (34 C.F.R. §76.651(a)(2)). Nonetheless, the EDGAR regulations also provide that non-public school students are to receive "program benefits . . . comparable in quality, scope and opportunity . . . " to those provided to "students enrolled in public schools" (34 C.F.R. §76.654(a)).

It was this latter provision of the EDGAR regulations which the Second Circuit relied on in support of its decision below, that public school districts must provide students with disabilities voluntarily attending non-public schools with on-site consultant teacher and teacher aide services on the premises of such schools. (pp. 9a-15a, *infra*). In plain language, however, the term comparable does not mean identical. Instead, it involves associations which are similar and dissimilar in nature. (Webster's New World Dictionary 283 (3d C.ed. 1988). Moreover, nothing in the language or history of IDEA or the IDEA

Regulations serves to attribute a different meaning to the term as it is applied to a comparison between the rights of students with disabilities voluntarily attending non-public schools and those enrolled in the public schools.

As set forth above, IDEA, the IDEA Regulations and the EDGAR Regulations themselves provide disabled students voluntarily attending non-public schools with the ability to obtain services, consistent with their "number and location." In the Second Circuit's view, however, these provisions serve merely to further limit the discretion and ability of public school districts to deny on-site services to non-public school students to instances when the cost of providing such services would exceed that of providing the same within the public schools. (pp. 12a-15a, *infra*). Again, however, nothing in the history of IDEA or it regulations support this interpretation.

(e) Administrative interpretation – As mentioned above, the Second Circuit's decision is also inapposite to the long-held interpretation of IDEA and its accompanying regulations followed by the U.S. Secretary of Education and the U.S. Department of Education. In their view, the statute distinguishes between the rights of disabled students attending non-public schools and those enrolled in the public schools. Public school districts are not required to provide disabled students attending non-public schools the same services they would receive if they attended public school. (*Response to Hon. Mitch McConnell*, 22 IDELR 369 (1994); *OSEP Memorandum 94-17*, 20 IDELR 1440 (1994); *Response to Inquiry from Robert R. Davila*, 16 EHLR 1398 (1990)).

The Second Circuit expressly rejected the position of the governmental official and agency responsible for overseeing the implementation of IDEA and the promulgation of the very regulations at issue herein, (pp. 11a-12a, *infra*), even though it dates back to when the original IDEA regulations were adopted. (*See*, 49 Fed. Reg. 48522 (Dec. 12, 1984)). The U.S. Secretary of Education explained as much in direct response to public comments concerning subsequent proposed changes to the IDEA regulations in 1984, when he further indicated that IDEA affords public education agencies "the discretion to devise . . . the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children." (*Id.*).

The Second Circuit's reliance on its own interpretation of the "comparable benefits" provision in the EDGAR regulations is clearly in conflict with the official governmental position pertaining to a public school district's responsibilities toward disabled student voluntarily attending non-public school. Under this Court's precedent in *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386-87 (1994), the Second Circuit should have afforded deference to the U.S. Secretary of Education and U.S. Department of Education's official interpretation of their own regulations, in the absence of any evidence that their interpretation of their own regulations is inconsistent with IDEA itself.

2. The Decision Below Conflicts With The Decisions of Two Other U.S. Circuit Courts of Appeals.

The decision below also conflicts with the decision of two other circuit courts of appeal concerning the same issue as to whether IDEA compels public school districts to provide special education and related services to students with disabilities voluntarily enrolled by their parents in a non-public school on-site at the premises of their non-public school.

In *Goodall v. Stafford County School Dist.* (*Goodall I*), 930 F.2d 363 (4th Cir.), *cert. denied* 502 U.S. 864 (1991), the United States Court of Appeals for the Fourth Circuit ruled that a public school district was not obligated to provide the services of a cued speech interpreter to a hearing-impaired student on-site at the premises of his non-public school, either under IDEA, its accompanying regulations, or the Free Exercise Clause of the First Amendment to the U.S. Constitution. According to the Fourth Circuit, where a school district provides services to students with disabilities within the premises of its own public schools, it is not required to make the services available to disabled students attending non-public schools on-site at the premises of the non-public school.

Unlike the Second Circuit in the decision below, the Fourth Circuit in *Goodall I* specifically rejected the notion that the "comparable benefits" provision of the EDGAR Regulations discussed above compels the provision of special education and/or related services on-site at the premises of non-public schools. In its analysis the Fourth Circuit examined and relied upon additional provisions within the IDEA and EDGAR Regulations that:

> [i]f a handicapped child has available a free appropriate public education and the parents choose to place the child in the private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.460. (34 C.F.R. §300.403(a)).
>
> A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements of §§76.652-76.662 *and in the authorizing statute and implementing regulations for a program.* (Emphasis added.) (34 C.F.R. §76.651(a)(1)).

The Fourth Circuit also relied on the U.S. Department of Education's interpretation of its own regulations discussed above, and rejected by the Second Circuit. (930 F.2d at 367-369).

In the Fourth Circuit's view, a ruling that public school districts are compelled to provide services to students with disabilities on-site at the premises of the non-public schools their parents voluntarily choose for them to attend would interfere "with the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local officials are far better qualified and situated than [a court] to make." (*Id.*, at 367-368, citing *Barnett v. Fairfax County School Board*, 927 F.2d 146, 152-153 (4th Cir. 1991)). Furthermore, if a public school district's offer of services

at a site other than the non-public school attended by a student with disabilities proves " 'meaningless', it is because of . . . parent[al] decisions and conditions for [their child's] education, not by the operation of . . . law." (930 F.2d at 369).

Likewise, in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), the U.S. Court of Appeals for the Seventh Circuit also ruled that IDEA and its accompanying regulations do not compel public school districts to provide services to students with disabilities on-site at the premises of the non-public school their parents have voluntarily elected for them to attend. The services at issue in *K.R. v. Anderson*. were those of a full-time instructional assistant.

Similar to the Fourth Circuit in *Goodall I*, the Seventh Circuit in *K.R. v. Anderson* concluded that "public school districts are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation." (*Id.* at 680). Like the Fourth Circuit, the Seventh Circuit refused to rely on the "comparable benefits" provision of the EDGAR Regulations as dispositive of the issue. (*Id.* at 677-680). In its view, such an approach "is problematic because it focuse[s] only on one section of a rather complex set of statutory and regulatory provisions. And not insignificantly, the . . . conclusion contradicts the conventional understanding of the IDEA, including the [U.S.] D[epartment] O[f] E[ducation]'s understanding." (*Id.* at 678).

In its analysis, the Seventh Circuit explained that IDEA differentiates between students with disabilities

who attend public schools, those who are placed at a private school by public school authorities and those who are voluntarily placed by their parents at a private school. And, with respect to the latter, IDEA requires that they be allowed to participate in IDEA programs only "'to the extent consistent with the number and location of children with disabilities' enrolled in private schools." (*Id.*). In reaching its final conclusion, the Seventh Circuit relied not only on the "equitable participation" provisions considered by the Fourth Circuit in *Goodall I*, but also on the "number and location" provisions discussed above and expressly rejected by the Second Circuit in the decision below. (*Id.*).

The Seventh Circuit further opined that public school districts enjoy discretion not only in deciding which benefits to provide to disabled students attending non-public schools, but also to "legitimately regulate the provision of expensive services, such as full-time assistants, in order to ration limited resources across more students." (*Id.* at 679). In its view, the "comparable benefits" provision subsequently relied on by the Second Circuit in its decision below "must be interpreted in a manner that permits public schools discretion in providing services to voluntarily placed private school students" consistent with applicable statutory provisions. (*Id.*).

Petitioner respectfully requests that this Court take notice a petition for writ of certiorari was filed with this Court in *K.R. v. Anderson*, on August 26, 1996 (No. 96-323), and that two federal district court decisions involving similar issues are presently pending before two other circuit courts of appeals. Thus, clarification from this Court would be critical to a final resolution of the

issues. *Fowler v. Unified School Dist. No. 259*, 900 F.Supp. 1540 (D.Kan 1995), is presently on appeal to the United States Court of Appeals for the Tenth Circuit. *Cefalu v. East Baton Rouge Parish School Bd.*, 907 F.Supp. 966 (M.D. La. 1995), is presently on appeal to the Fifth Circuit. Both involve the provision of interpretive services on-site at a non-public school. Both relied on the district court decision overturned by the Seventh Circuit to rule that IDEA obligates public school districts to provide such services. In the past, federal district courts in other jurisdictions have reached conclusions different to those in *Fowler* and *Cefalu*. (*e.g., Tribble v. Montgomery County Board of Educ.*, 798 F.Supp. 668 (M.D.Ala. 1992); *McNair v. Cardimone*, 676 F.Supp. 1361 (S.D. Ohio 1987), *aff'd on other grounds*, 872 F.2d 153 (6th Cir. 1989)).

Based upon the great confusion which exists across the nation regarding the provision of services to students with disabilities voluntarily attending non-public schools, a review by this Court is warranted and is most essential. Moreover, to the extent that the Second Circuit committed error in concluding that public school districts enjoy only limited discretion in their ability to deny on-site services to such students, its decision impairs the ability of public school districts to provide educational benefits and opportunities to all students enrolled within the public schools.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: Albany, New York
November 15, 1996

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 996 August Term, 1995

(Argued: February 1, 1996 Decided Jun. 12, 1996

Docket No. 95-7756

COLLEEN RUSSMAN, a child with disabilities, by her parents, PATRICIA and PAUL RUSSMAN,
Plaintiffs-Appellees,

v.

THOMAS SOBOL, as Commissioner of the New York State Education Department,
Defendant,

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Defendant-Appellant.

Before: OAKES, WINTER, and WALKER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*) granting summary judgment for the plaintiffs. Plaintiffs' complaint alleged, *inter alia*, that the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, requires a school district to provide a disabled student with a teaching aide and consultant at a

parochial school and that such action does not violate the Establishment Clause of the First Amendment. We affirm the district court's grant of summary judgment for the plaintiffs.

CORY HAINES, Law Intern, Disabilities Law Clinic of Albany Law School, Albany New York (Nancy M. Maurer; Joseph Connors; Michael Cardinale, law intern, of counsel), *for Plaintiff-Appellee.*

STEPHEN F. BAILLY, Hicks & Bailly, Albany, New York, *for Defendant-Appellant.*

Michael L. Co[illegible]llo, Albany, New York (Richard E. Barnes, John A. Liekweg, Mark A. Mainello, of counsel), *for Amicus Curiae New York State Catholic Conference.*

Gerald A. Rosenberg, Rosenman & Colin, New York, New York (John F. Finnegan, Bruce M. Sabados, Rosemary Halligan, Stacey B. Creem, of counsel), *for Amici Curiae New York State Schools are for Everyone, the National Association of Protection and Advocacy Systems, and Western New York Disability Law Coalition.*

Jay Worona, Albany, New York (Pilar Sokol, of counsel), *for Amicus Curiae New York State School Boards Association, Inc.*

WINTER, *Circuit Judge*:

This appeal presents important questions concerning obligations imposed upon public school authorities by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and the constitutionality of those obligations under the Establishment Clause of the First Amendment. Colleen Russman and her parents commenced this suit against the Board of Education of Watervliet, New York (the "school district"), alleging that the school district's refusal to provide Colleen special education services at a parochial school violates Section 1413 of New York Educ. Law § 3602-c, and the Free Exercise Clause of the First Amendment to the United States Constitution. On cross-motions for summary judgment, Magistrate Judge Smith granted judgment for the school district on the grounds that: (i) IDEA forbids the school district from using federal funds to provide instructional services at a parochial school; (ii) New York law does not require the school district to provide special education services at parochial schools; and (iii) such aid is forbidden by the Establishment Clause of the First Amendment to the United States Constitution. Judge Cholakis reversed Magistrate Smith's ruling and granted summary judgment for the Russmans.[1] The school district appeals, and we affirm.

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[1] Although Judge Cholakis's opinion suggests that some issues of fact remain for trial, *see Russman v. Board of Education*, No. 93-CV-905, slip op. at 5-6, 12 n.12 (N.D.N.Y., June 30, 1995), a final judgment was nevertheless entered for plaintiffs. We see no issue for trial.

BACKGROUND

The pertinent facts are not in dispute and were set forth in detail in the two district court opinions, *Russman v. Board of Educ.*, No. 93-CV-905, slip op. (N.D.N.Y., June 30, 1995); *Russman v. Board of Educ.*, No. 93-CV-905, slip op. (N.D.N.Y., June 22, 1994), familiarity with which is assumed. Colleen Russman, currently fifteen years old, has been classified as mentally retarded since 1986. For the first five years of her schooling, Colleen was educated in classes set aside by the school district exclusively for children with disabilities. In the Spring of 1991, Colleen's parents asked the school district's Committee on Special Education to develop an Individualized Educational Program ("IEP") for Colleen that would allow her to be "mainstreamed" into a regular, age-appropriate class. The IEP developed by the district called for the services of a consultant teacher to work with the regular classroom teacher in modifying the academic curriculum for Colleen and a teaching aide to assist Colleen directly with her studies. It provided as well for speech and occupational therapy. The parties agree that the mainstream program is appropriate for Colleen and that the services described in the IEP are necessary for her to be mainstreamed successfully. Agreement ends here.

Colleen and her parents wish to implement the IEP at St. Brigid's Regional Catholic School, the school that Colleen's two sisters attend. The Russmans can and will pay St. Brigid's tuition, but they cannot afford to pay for the support services of a consultant teacher and a teaching aide. The Russmans do not seek special education services in connection with religious courses but only in connection with core academic subjects such as math and

English. The school district refuses to implement the plan at a parochial school. Although the district provides speech and occupational therapy to other students at a "neutral" site at St. Brigid's, the school district contends that the provision of a consultant teacher and a teaching aide for Colleen at St. Brigid's would violate the Establishment Clause of the First Amendment.

The school district's decision to provide Colleen with special education benefits only at a Watervliet public school was upheld by an impartial hearing officer on December 24, 1992. That decision was affirmed by the state review officer of the New York State Education Department on March 8, 1993. Subsequently, Colleen, then eleven years old, and her parents brought the present action alleging that the failure to provide the services at St. Brigid's violates the Free Exercise Clause of the First Amendment to the United States Constitution as well as federal and state statutory law. During the pendency of the administrative proceedings and this litigation, Colleen has had her IEP implemented in a Watervliet public school.

DISCUSSION

We review a district court's grant of summary judgment *de novo, United States v. Articles of Banned Hazardous Substances,* 34 F.3d 91, 96 (2d Cir. 1994), affirming only where there are no genuine issues of material fact and the moving party is entitled to judgment as matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

A. *The Establishment Clause*

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The school district argues that the Establishment Clause prohibits it from implementing Colleen's IEP at St. Brigid's. We disagree.

Where government programs are made available to a broad class of citizens defined in a religion-neutral fashion, the individuals receiving the benefits may choose to use them in a religious setting, and the program does not thereby violate the Establishment Clause. *See Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (Establishment Clause does not forbid blind student studying at Christian college from receiving generally available state assistance distributed to blind students for vocational training); *Mueller v. Allen*, 463 U.S. 388 (1983) (state law that provided tax deductions for certain educational expenses not unconstitutional even though deductions might primarily benefit parents whose children attended sectarian schools); *see also Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 115 S. Ct. 2510, 2521-24 (1995) (state university does not violate Establishment Clause by funding printing services for student newspaper with heavily Christian themes where printing services are provided as part of policy of funding all student newspapers without respect to religion).

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Supreme Court held that a public school district may constitutionally use IDEA funds to provide a sign language interpreter for a deaf student at a Catholic

high school. *Id.* at 13. Under *Zobrest*, the provision of governmental services to a religious school will survive a First Amendment challenge if: (i) the services are provided in a neutral manner without regard to religion; (ii) the services are provided at the parochial school not as a result of legislative choice but rather as a result of the private choice of the individual utilizing the services; and (iii) the funds traceable to the government do not "find their way into the sectarian schools' coffers." *Zobrest*, 509 U.S. at 10-11.

The special assistance required by Colleen's IEP would satisfy these factors if provided at St. Brigid's. First, the assistance is a neutral governmental service made available without regard to religion. *See id.* at 10. Second, the teaching aide and teaching consultant will provide services at St. Brigid's solely because of a decision made by the Russman family. *See id.* Third, the special education benefits flow directly to Colleen and do not financially benefit St. Brigid's. *See id.* (funds spent on special education services under IDEA not comingled with funds belonging to sectarian schools); *see also Rosenberger*, 115 S. Ct. at 2523-24 (where school pays third-party contractor to perform services to program beneficiaries and funds are not paid directly to religious organization, benefit received by religious organization is incidental and does not violate Establishment clause). Thus, provision of the stipulated services to Colleen falls within the scope of permissible activity under *Zobrest*.

We are not persuaded by the school district's argument that under *Meek v. Pittenger*, 421 U.S. 349 (1975), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), it is prohibited from providing such services to Colleen. In

Meek and *Ball* the Court struck down government programs that provided teachers, counselors, teaching materials, and equipment to sectarian schools. However, both cases involved massive grants provided directly to the parochial schools so as to benefit the religious institutions financially. *See Meek*, 421 U.S. at 364-65 (direct loan of teaching material and equipment, as well as teachers and guidance counselors, to private schools, 75 percent of which were religious); *Ball*, 473 U.S. at 375-79 (discussing school district's shared time and community education programs, which provided classes to sectarian school students at public expense). These cases are therefore inapposite.

The school district also fails to persuade us that *Zobrest* authorizes only entirely mechanical assistance, such as verbatim translations by sign language or physical assistance in traveling. Although we recognize that, unlike the sign-language interpreter in *Zobrest*, the teaching aide and consultant here provide cognitive assistance, this distinction is not dispositive. The primary purpose of both a sign language interpreter and a teaching aide is solely to make the material intelligible to the disabled student, not to create a particular religious message or to advance a particular religious viewpoint. In such cases there is little danger of "excessive entanglement" by government actors with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). To hold otherwise would interpret *Zobrest* in a way that distinguishes between students with physical disabilities, for whom mechanical assistance is necessary, and those with mental disabilities, for whom cognitive assistance is necessary, for purposes of IDEA. The statute makes no such distinction, and we decline to

carve one into the Constitution. Because we decline to differentiate between cognitive and physical assistance, the parties' dispute over whether religious content can be found in St. Brigid's core curriculum is immaterial.

We turn now to the question of whether the state is required to provide these services at non-public schools.

B. *The Individuals with Disabilities Act*

The IDEA conditions monetary grants to states by requiring that they provide a "free appropriate public education" to disabled children, 20 U.S.C. § 1412(1), including special education or other services as needed by particular children, 20 U.S.C. §§ 1412(4), § 1414(a)(5). If necessary, a state may place a disabled child in a private school at public expense. 20 U.S.C. § 1413(a)(4)(B).

The statute imposes somewhat different obligations regarding disabled children who are voluntarily placed in private schools. It requires states to "provid[e] for such children special education and related services." However, this obligation is limited by the phrase "to the extent consistent with the number and location of" such children in a state. Turning to pertinent regulations, 34 C.F.R. § 300.403, provides that:

> [i]f a child with a disability has a [free appropriate public education] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under [various regulations].

Other regulations state that school districts must afford to children who attend private schools benefits that are "comparable in quality, scope, and opportunity for participation to the program benefits that the [district] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a). They also require that each local educational authority "provide special education and related services designed to meet the needs of private school children with disabilities."

The school district argues that although the IDEA requires it to provide Colleen with special education services, nothing in the statute or regulations requires that the school district provide the services on-site at a private school. The caselaw on this issue is mixed. At least two district courts have held that the IDEA compels states to provide on-site benefits to handicapped children at non-public schools. *See Cefalu v. East Baton Rouge Parish Sch. Bd.*, 907 F. Supp. 966 (M.D. La. 1995) (IDEA requires school district to provide sign-language interpreter for deaf student at parochial school); *Fowler v. Unified Sch. Dist. No. 259*, 900 F. Supp. 1540 (D. Kan. 1995) (school district required to provide interpretive services for deaf student at private, non-sectarian school).

However, two courts of appeals have held to the contrary. In *Goodall v. Stafford County Sch. Dist.*, 930 F.2d 363 (4th Cir.), *cert. denied*, 502 U.S. 864 (1991), the Fourth Circuit held that where a school district offered to provide services to disabled students at a public school, the Education of the Handicapped Act ("EHA"), an earlier version of the present IDEA, *see* Education of the Handicapped Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141 (1990) (revising short title), did not

require that the district make the services available to students at a sectarian school. In *K.R. v. Anderson Community School Corporation*, 81 F.3d 673 (7th Cir. 1996), the Seventh Circuit held that a school district had discretion under the IDEA and pertinent regulations to decline to offer a full-time instructional assistant to a student at a private school so long as such an assistant was offered to the student at the public school. *Cf. McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987) (EHA does not compel provision of transportation to and from private school for child with hearing impairments), *aff'd*, 872 F.2d 153, 156-57 (6th Cir. 1989) (affirming on ground that transportation is not service required by child's disability but refusing to reach question whether EHA compelled provision of necessary services to handicapped children attending private schools).

It appears that the Department of Education shares the view that the IDEA affords some discretion regarding the on-site provision of special educational services at private schools. *See* 20 Individuals With Disability [sic] Educ. L. Rep. 1440 (1994) (memorandum stating that private school children need only be afforded genuine opportunity for equitable participation and have no entitlement to full range of services offered public school children); 22 Individuals With Disabilities Educ. L. Rep. 369 (1994) (response letter stating same); 16 Educ. for Handicapped L. Rev. 1398-1400 (1990) (response letter stating that whether or not public school needs to provide on-site services at private school depends on specific facts); 49 Fed. Reg. 48522 (1984) (public schools have "discretion to devise . . . the most efficient scheme possible for providing adequate special education and related

services to a number of, but not necessarily all, private school handicapped children"); 45 Fed. Reg. 22570 (1980) (public school need offer only genuine opportunity for equitable participation and what constitutes "genuine opportunity" will "vary widely, depending on local circumstances");

Although we do not take the position that the IDEA requires the on-site provision at private schools of any and all services that might be required in the context of public education, we read the statute to accord greater rights to disabled children voluntarily in private schools than do some of the authorities cited above. In particular, we view *Goodall* as unpersuasive. *Goodall* relied, *inter alia*, on 34 C.F.R. § 76.532, which prohibits the use of IDEA funds for "religious . . . instruction." 930 F.2d at 369. This regulation is coextensive with the Establishment Clause and does not create any separate regulatory limitation on IDEA. *See Zobrest*, 509 U.S. at 7 n.7. Central to *Goodall's* holding was its view that provision of special services to a student in a parochial school would be unconstitutional and thus violative of Section 76.532. Because we hold that the provision of services to Colleen Russman at St. Brigid's does not violate the Establishment Clause, *see supra*, we conclude that it likewise does not violate Section 76.532.

Although *Anderson* is somewhat more persuasive, it nevertheless accorded excessive discretion to school authorities to deny the on-site provision of services to disabled students in private schools. *Anderson* relied principally on the different statutory and regulatory language used with regard to disabled students attending public schools and those voluntarily placed in private schools.

Based on these differences, it concluded that there was "little doubt that . . . Congress intended to give disabled students voluntarily attending private school a lesser entitlement," 81 F.3d at 678, and permitted school authorities to refuse to provide an instructional assistant to a disabled student in a private school. *Id.* at 679.

Anderson is unquestionably correct that the rights accorded disabled students in public schools differ from those accorded such students voluntarily placed in private schools. However, the principal difference stems from the IDEA language limiting the obligation of states to provide special education and related services to private school students "to the extent consistent with the number and location" of disabled children voluntarily in public schools. *Anderson* failed, however, to analyze the import of the specific language with regard to the individualized service that was denied.

In our view, the quoted reference to the "number" of students involves services to groups of students rather than the individualized service at issue in *Anderson* and in the present case. If, to take a simple example, one occupational therapist can efficiently aid five disabled students and three therapists are available in a public school attended by fourteen such children, public school authorities are not required by the IDEA to provide a therapist to a private school with only one such student. In our view, the statute affords discretion to offer occupational therapy to the private school child only at a public school because of the higher per-student cost of providing it at the private school. However, nothing in the quoted language suggests that, where a private school is

attended by five disabled children and the cost per student of providing an occupational therapist at the private or public school is identical, school authorities may limit such services to the public school. Nor does the language suggest that an individually tailored service may be offered only at a public school. The reference to the "number" of students suggests only that school districts have discretion to deny on-site provision of services at private schools where economies of scale in providing the services at one place exist.

With respect to the statutory reference to "location," we read the IDEA to mean only that, where the provision of services at a distant private school would entail significant additional costs, e.g., transportation, to be borne by the state, public school authorities may fulfill their IDEA obligations by offering the services at a local public school.

We do not, therefore, agree with *Anderson*'s vesting of school authorities with broad discretion to deny on-site individualized services to private school students. Indeed, apart from the limiting language discussed above, the statute and regulations are more consistent with mandatory entitlements than with discretionary authority. Where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools. The statute and regulations require that necessary services be provided to disabled private school students according to their needs rather than the name of their school, *see Zobrest*, 509 U.S. at 13, and state that such services must be "comparable in quality, scope, and

opportunity for participation" to those offered to public school students. 34 C.F.R. § 76.654. Use of the word "comparable" strongly suggests that the provision of services will usually take place outside the public school. Otherwise, the regulation would simply provide that any services for the disabled available at a public school must be open to private school students.

Moreover, if services required by the IDEA need be provided only in public schools even absent fiscal concerns, then private school students are entitled under the IDEA to little more than after-school services. Most services required by an IEP must be provided during school hours to be effective. For example, a teaching consultant cannot benefit a disabled student in a private school if available only outside her school and divorced from her curriculum. If public school authorities may freely refuse to provide such benefits at private schools, therefore, disabled students must either forgo the IDEA benefits, bear their cost, or transfer to the public schools. This result, however, seems to be precisely what the statute and regulations seek to preclude. Indeed, the principal purpose of the statutory and regulatory commands appears to make a child's disability irrelevant to the family's choice of school, at least where differences in costs of provision do not exist.

Turning specifically to the facts of the present case, no claim is made by the school district that providing Colleen Russman with a teaching consultant and teaching aide at St. Brigid's is significantly more expensive than providing the same services at the public school. Indeed, the only reason offered by the district for the denial of

services is its view that the Establishment Clause prohibits the on-site provision of such services at a parochial school, an issue disposed of above. To obtain the benefits to which she is entitled under the IDEA, Colieen has been forced to abandon her choice of school, a result contrary to the purpose of the statute. We therefore hold that the IDEA requires the school district to provide Colleen with the consultant and aide at St. Brigid's.

In view of our disposition of this matter, we need not address the Russmans' Free Exercise and state law claims.

We therefore affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
NEW YORK

93-CV-905

IN THE MATTER OF THE
APPEAL OF COLLEEN RUSSMAN,
A CHILD WITH DISABILITIES, BY
HER PARENTS, PATRICIA AND
PAUL RUSSMAN,

Plaintiffs,

-against-

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL
DISTRICT OF THE CITY OF
WATERVLIET,

Defendant.

APPEARANCES:	OF COUNSEL:
DISABILITIES LAW CLINIC OF ALBANY LAW SCHOOL 80 New Scotland Avenue Albany, New York 12208	Nancy M. Maurer, Esq. Lisa Schreiner and Louis Maslow, II Law Interns
HICKS & BAILLY, ESQS. Attorneys for Defendant 744 Broadway Albany, New York 12207	Stephen F. Bailly, Esq.

CON. G. CHOLAKIS, D.J.

MEMORANDUM DECISION AND ORDER

Colleen Russman, a student residing in the Watervliet School District, has been identified as mentally retarded since 1986; and, until 1991, she was placed in a variety of segregated public educational programs. In the Spring of 1991, her parents requested that the Committee on Special Education ("CSE") develop an individualized Educational Program ("IEP") which would allow Colleen to be "mainstreamed" – *i.e.*, included in a "regular" classroom setting. The further desire of the Russmans, to have this IEP implemented at St. Brigid's Regional Catholic School, is at the core of the controversy in this case.

The IEP developed by the CSE provided for the services of a consultant teacher and a teaching aide[1], as well as on-site speech and occupational therapy. The parties agree that such an inclusion program is appropriate for Colleen and that, in order for this program to be successful, the services set forth in the IEP must be provided. Nevertheless, the provision of the consultant teacher and teaching aide[2] *at a sectarian location* was ultimately denied

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[1] This IEP provides for consultant teacher services for 1/2 hour per day of direct assistance in reading, math, and language arts, and 1/2 hour per day of indirect consultation with the classroom teacher regarding modification of test and classroom assignments for reading, English, spelling, penmanship, math, social studies, science, and health. The IEP also provides for a teaching aide to give "support teaching" to Colleen in reading, English, spelling, penmanship, math, social studies, science, and health.

[2] The parties agree that the speech and occupational therapy may properly be provided at St. Brigid's.

by the CSE, based upon its determination that such services would violate the Establishment Clause of the First Amendment to the U.S. Constitution.

As a result, plaintiff commenced the instant action, claiming that this denial of services violates: (1) Section 1413 of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; (2) New York Education Law § 3602-C; and (3) the Free Exercise Clause of the First Amendment to the U.S. Constitution. Both parties consented to proceed before Magistrate Judge Ralph W. Smith (with an election to appeal to the district judge) and an Order of Reference was signed and filed by this Court on April 18, 1994. Subsequently, by Memorandum-Decision and Order dated June 22, 1994 ("MDO"), Magistrate Judge Smith denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment – finding that the provision of the services of a consultant teacher and a teaching aide at St. Brigid's would violate both federal law, *i.e.*, 34 C.F.R. § 76.532(a)(1)[3], and the Establishment Clause. Presently before this Court is plaintiff's appeal of the judgment entered in accordance with this MDO.

"The standard applied by a reviewing court to determine whether summary judgment was properly granted

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[3] 34 C.F.R. § 76.532(a)(1) states:

> (a) No State or subgrantee [*i.e.*, local school district] may use its grant or subgrant to pay for any of the following:
>
> (1) Religious worship, instruction, or proselytization.

is the same as that applied by the [lower] court initially under Rule 56(c)."[4] *Burtnieks v. City of New York*, 716 F.2d

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[4] Pursuant to the standard set forth in Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

In deciding such a motion, the Court is not to resolve disputed issues of fact, but rather, to assess whether a genuine issue regarding a material fact remains for the trier of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Daniel P. Foster, P.C. v. Turner Broadcasting System, Inc.*, 844 F.2d 955, 959 (2d Cir. 1988), *cert. denied* 488 U.S. 994, 109 S.Ct. 559, 102 L.Ed.2d 585 (1988) (quoting *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). The record is assessed in a light most favorable to the non-movant, and all reasonable inferences are drawn in the non-movant's favor. *See Ramsuer v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). A non-movant who bears the ultimate burden of proof, however, must demonstrate that there is *some* evidence which would create a genuine issue of material fact. *See Twin Laboratories, Inc. v. Weider Health and Fitness*, 900 F.2d 566, 568 (2d Cir. 1990). This evidence cannot be "conclusory allegations," id., or "mere speculation," *Howard v. Gleason Corp.*, 901 F.2d 1154, 1159 (2d Cir. 1990), but rather something more than a "scintilla of evidence", *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and more than "some metaphysical doubt as to the material facts". *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Furthermore, summary judgment cannot be avoided by immaterial factual disputes". *Howard v. Gleason Corp.*, 901 F.2d at 1159.

982, 985 (2d Cir. 1983) (citing C. Wright, A. Miller & M. Kane, 10 *Fed.Prac. & Proc.* § 2716 (2d ed. 1983)).

One of the basic tenets of this standard is that "[c]redibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions [or the trier-of-fact at trial], not those of a judge . . . ruling on a motion for summary judgment[.] *Anderson*, 477 U.S. at 255. In reaching his decision, however, Magistrate Judge Smith made numerous findings of fact material to the law as he applied it.

Regarding his determination that federal law would be violated, the Magistrate Judge found that "the evidence does not support [plaintiff's] assertion that '(r)eligious themes are specifically addressed only in a separate religion class[,] [and] there is no religious content to any of the courses or activities for which Colleen requires assistance pursuant to her IEP[;] *[but] [r]ather, it is clear from the transcripts and exhibits submitted that religious instruction is included in the various academic classes at St. Brigid's*. MDO, p.5 (quoting plaintiff's Rule 10(j) Statement at ¶ 20) (emphasis added). In reaching this conclusion, he found "incredibl[e]" the testimony of St. Brigid's principal, Ms. Ana Yeomans, "that there is no religious aspect to teaching courses other than religion," *id.* at 6, and found further that her "contradict[ory]" and "inconsisten[t]" testimony did not warrant a denial of summary judgment due to an issue of material fact. *Id.* at 7. However, although the evidence may overwhelmingly favor a finding that religious instruction is included in the various academic classes at St.Brigid's, Yeomans' testimony did create a factual dispute *material* to the law as applied by Magistrate Judge Smith.

Moreover, in finding that the Establishment Clause would be violated, he found that

> here we are dealing with a teacher and a teaching aide who have to modify the **content** of the academic classes for Colleen. *I do not agree with plaintiffs' characterization of the consultant teacher and the aide as mere interpreters of the course materials.*

Id. at 12 (first emphasis in original, other emphasis added).

These findings supported his further determination that "by requiring the consultant teacher to modify the academic classes for Colleen, and by requiring the teaching aide to give direct individual teaching support to Colleen in subjects which have religious content, they would be furthering the religious mission of the school." *Id.* at 13.

However, the resolution of the underlying factual disputes which support such a determination is not a function of a judge on a motion for summary judgment. Accordingly, the summary judgment in favor of defendant must be reversed.

In addition, this Court is not in agreement with the Magistrate Judge's interpretation of the applicable law: under a recent Supreme Court decision, the finding that religious instruction is included in academic course of St Brigid's is irrelevant to the present Establishment Clause issue. That decision, relied on by both parties to support their opposing opinions, and the case upon which Magistrate Judge Smith based his decision regarding the Establishment Clause, was issued in the recent Supreme Court

case of *Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct 2462, 125 L.Ed.2d 721 (1993)[5]. In *Zobrest* the Supreme Court held that a public school district did not violate the Establishment Clause by providing a sign-language interpreter under the IDEA to a deaf student in a parochial school "in order to facilitate his education." *Id.*, 113 S.Ct at 2469.

In reaching this holding, the Supreme Court first recognized that it had "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an establishment clause challenge just because sectarian institutions may also receive an attenuated benefit." *Id.*, 113 S.Ct. at 2466. Two factors support such a holding: (1) the program's benefits are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited[,]' " *id.* at 2467 (quoting *Witters v. Washington*

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[5] In *Zobrest*, the Supreme Court acknowledged that § 76.532 – the regulation upon which Magistrate Judge Smith found a violation of federal law – does not create a separate regulatory limitation on the IDEA, but "merely implements the Secretary of Education's understanding of (and thus is coextensive with) the requirements of the Establishment Clause." *Zobrest*, 113 S.Ct. at 2465, n.7. In other words, § 76.532 is merely a regulation " 'based on the Department's interpretation of [the] constitutional requirements[,]' " authorized by the Secretary's general rulemaking power, and providing no greater constraint than the Establishment Clause upon which it is based. *Id.* (citations omitted) Thus, the Supreme Court went on to consider the violation of that constitutional clause rather than a specific violation of the regulation. This Court will do the same.

Dep't of Services for Blind, 474 U.S. 481, 487 (1986)[6]; and (2) " '[a]ny aid provided under [a] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choice of aid recipients[,] . . . [as a result,] [t]he program . . . creates no financial incentive for students to undertake sectarian education.' " *Id.* (quoting *Witters*, 474 U.S. at 487-88)[7].

As in *Zobrest*,

> [t]hat same reasoning applies with equal force here. *The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid [consultant teacher and teaching aide] will be present in a sectarian school only as a result of the private decision of individual parents.* In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, [the consultant teacher or teaching aide's] presence there cannot

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[6] *See also Mueller v. Allen*, 463 U.S. 388, 398 (1983) (the provision of the program's benefits to a broad spectrum of families – "whether their children attend public school or private – strongly indicates a *secular* effect).

[7] *See also Mueller*, 463 U.S. at 399 (because public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," such a program is distinguished from other programs which involve "the direct transmission of assistance from the State to the schools themselves" in violation of the Establishment Clause).

> be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters*, then, . . . *[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," Witters*, supra, at 488, 106 S.Ct., at 752, *it follows under our prior decisions that provision of that service does not offend the Establishment Clause.* See *Wolman v. Walter*, 433 U.S. 229, 244, 97 S.Ct. 2593, 2603, 53 L.Ed.2d 714 (1977). Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, *no funds traceable to the government ever find their way into sectarian schools' coffers.* The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the handicapped child's tuition – and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA [consultant teacher and teaching aide], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

Zobrest, 113 S.Ct at 2467-68.

Thus the present case, as was *Zobrest*, is distinguishable from those cases[8] where *direct* grants of aid from the government "relieved sectarian schools of costs they otherwise would have borne in educating their students[,]" *id.*, 113 S.Ct at 2468 – "this kind of direct aid is indistinguishable from the provision of a direct cash subsidy to the religious school." *Ball*, 473 U.S. at 395. Here, "[t]he extension of aid to the [Russmans], however, does not

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[8] *e.g., Meek v. Pittenger*, 421 U.S. 349 (1975) *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

amount to 'an impermissible "direct subsidy" ' of [St. Brigid's]." *Zobrest*, 113 S.Ct at 2468-69 (quoting *Witters*, 474 U.S. at 487). "Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries." *Id.*, 113 S.Ct at 2469.

The Supreme Court also distinguished *Zobrest* by recognizing that "the task of a sign-language interpreter seems . . . quite different from that of a teacher or guidance counselor" and, moreover, that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.*, 113 S.Ct at 2469[9]. This distinction focused on the "parents[']hav[ing] chosen of their own free will to place [their child] in a pervasively sectarian environment[,] [and that] [t]he sign-language interpreter they have requested *will neither add to nor subtract from that environment*, and hence the provision of such assistance is not barred by the establishment Clause." *Id.*, 113 S.Ct at 2469 (emphasis added)[10]. In at

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[9] The Supreme Court has "made clear that 'the provision of health services to all schoolchildren – public and nonpublic – does not have the primary effect of aiding religion,' even when those services are provided within sectarian schools." *Zobrest*, 113 S.Ct at 2469, n.10 (quoting *Wolman v. Walter*, 433 U.S. 229, 242 (1977)).

[10] Rather than basing its holding upon a determination that, "[t]he sign-language interpreter . . . will neither add to nor subtract from [the sectarian] environment," the Supreme Court offered this statement as part of its second reason for distinguishing the *Zobrest* case from *Meek* and *Ball*. The holding in *Zobrest* is primarily founded upon: (1) a recognition that the aid is dispensed not to sectarian schools but to individual handicapped children: and (2) that the choice to enroll in a sectarian school is that of the child or the child's parents.

least one recent case, *K.R. v. Anderson Community School Corp.* 1995 WL 318859, *11 (S.D.Ind., May 25, 1995), the holding of *Zobrest* was extended to allow the provision of an "instructional assistant" at a private parochial school.[11]

Thus, notwithstanding the public employee's physical presence in a sectarian school, assisting in religious education, the Supreme Court held such aid to be constitutionally permissible, despite the fact that this employee would "convey[] religious messages." *Zobrest*, 113 S.Ct at 2472 (Blackmun, J. dissenting) ("A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which [the sectarian school] encourages attendance for Catholic students. In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance."); *see also id.*, 113 S.Ct. at 2468-69.

[11] The court in *Anderson Community School* focused on the IDEA's requirement that a student at a private school, in need of a particular benefit which can only be meaningfully provided in-class or on-site, must "receive a benefit comparable to the benefit she would receive if she attended public school . . . [and such benefit] must be provided . . . at her private school." *Anderson Community School*, 1995 WL 318859, *3 (citing 34 C.F.R. § 76.654(a).

34 C.F.R. § 76.654(a)) provides:

> Comparable benefits. The program benefits that a subgrantee [local school district] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

Thus, federal law would appear to moot any contention that New York State law does not require a school district to provide such benefits on-site at a private school.

Thus, because the services set forth in Colleen's IEP are to be provided through a "general program that is in no way skewed towards religion[,]" under which "no funds traceable to the government ever find their way into sectarian schools' coffers[,]" *id.*, 113 S.Ct. at 2467-68, any factual determination regarding the inclusion of religious instruction in the various academic classes at St. Brigid's is irrelevant to consideration of an Establishment Clause violation under *Zobrest*. The only determination remotely necessary under *Zobrest* is whether or not the provision of the consultant teacher and a teaching aide is a "neutral service": *i.e.*, will the modifications they make to facilitate Colleen's education *add or subtract* from the sectarian environment of St. Brigid's, or will they merely make it *accessible* to Colleen?

Although such services might add to the secular *educational* environment at St. Brigid's, there is no evidence that the provision of a consultant teacher and teaching aide would add to the *religious* environment at the school. Moreover, if the provision of these services at a public school would not add a religious element to that environment, those same services should not bring such an additional element to the sectarian environment at St. Brigid's. The record demonstrates that the defendant has come forth with no admissible evidence to show that such services will add or subtract from the sectarian environment of St. Brigid's, having focused instead on the presence of religious instruction in the various academic classes at St.Brigid's. Thus, the defendant has not

demonstrated the existence of a material factual dispute regarding this issue.[12]

Accordingly, the Magistrate Judge's denial of plaintiff's motion for summary judgment is hereby reversed.

IT IS SO ORDERED.

/s/ Con. G. Cholakis
CON. G. CHOLAKIS,
JUDGE
UNITED STATES
DISTRICT COURT

DATED: Albany, New York
June 30, 1995

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[12] This is an element essential to the District's defense of the case, and upon which the District will bear the burden of proof at trial. The allegation of an Establishment Clause violation is raised by the District in the face of plaintiff's otherwise undisputed entitlement to such benefits under the IDEA.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPEAL OF COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN

V.

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET

JUDGMENT IN A CIVIL CASE

(Filed Jul. 6, 1995)

CASE NUMBER: 93-CV-905 (CGC)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that upon plaintiff's appeal of the Judgment entered June 28, 1994, and in accordance with the Memorandum Decision and Order of the Honorable Con. G. Cholakis, U.S. District Judge, dated June 30, 1995, the findings by the U.S. Magistrate Judge for summary judgment in favor of defendant is reversed and the denial of plaintiff's motion for summary

judgment is reversed. Judgment shall enter in favor of plaintiff.

JULY 6, 1995. — *Date*

GEORGE A. RAY — *Clerk*

/s/ Sandra S. Haker
SANDRA S. HAKER
(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
OF NEW YORK

In the Matter of the Appeal of
COLLEEN RUSSMAN, a Child
With Disabilities, by her parents,
PATRICIA and PAUL
RUSSMAN,

Plaintiffs,

vs.

Civil No.
93-CV-905 RWS

BOARD OF EDUCATION OF
THE ENLARGED CITY SCHOOL
DISTRICT OF THE CITY OF
WATERVLIET,

Defendant.

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RALPH W. SMITH, JR.
United States Magistrate
Judge

MEMORANDUM-DECISION AND ORDER

By Order dated April 18, 1994, the Honorable Con. G. Cholakis referred this matter to the undersigned for all further proceedings and the entry of judgment upon consent of the parties in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Colleen Russman is eleven years old and since 1986 has been classified as mentally retarded. For the 1991-92 school year her parents proposed that she receive an inclusion program in which for the first time she would be placed in a regular, age-appropriate class and receive support services from the School District (hereinafter "the District").

The Individualized Educational Programs (hereinafter "IEPs") developed by the District Committee on Special Education (hereinafter "CSE") in 1991 and 1992 recommended that Colleen receive the assistance of a consultant teacher[1] and a teaching aide[2] as well as speech

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[1] The IEP for the 1992-93 school year provided for consultant teacher services for one hour per day, which includes one-half hour of direct assistance in reading, math, and language arts, and the other half hour of indirect consultation with the classroom teacher concerning test modification and classroom assignments for reading, English, spelling, penmanship, math, social studies, science, and health. The consultant teacher modifies the academic curriculum to make it appropriate for Colleen.

[2] The 1992-93 IEP provides for a teaching aide to provide "direct support teaching services" to Colleen in reading, English, spelling, penmanship, math, social studies, science, and health. The aide works directly with Colleen, rather than with the classroom teacher or the other children in the class, and

and occupational therapy. The parties agree that an inclusion program is appropriate for Colleen and that in order for her to benefit from education in a regular classroom, she must receive the support services identified in her IEP. They disagree, however, as to where the IEP should be implemented.

Colleen's parents want her to receive her education at St. Brigid's Regional Catholic School (hereinafter "St. Brigid's), a private sectarian school. Initially they stated that they wanted Colleen to attend St. Brigid's because they wanted her to go to the same school as her two younger sisters.[3] (11/15/91 Hearing Transcript at 137-38, 143, 156). However, during a subsequent administrative hearing they added that their decision was also based upon religious reasons and the small class sizes.

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is supervised primarily by the consultant teacher, but some supervision would occur between the mainstream teacher and the aide. (See 10/15/92 Hearing Transcript at 30-32 – Record on Appeal #14).

[3] Colleen's mother stated at the administrative hearing:

> We wanted Colleen at St. Brigid's because our other children are there. That's important to us and it's important to Colleen. She should be in school with her sisters. She has all the right to be there. They are her sisters. They miss each other. The emotional turmoil has – it has caused my children – it's not fair. They cannot attend the same activities together. Sometimes they have different days off or different vacations. It's not normal for children of different – to go to different schools from the same family. They need to be a family. She needs to feel like a part of them.

(11/15/91 Hearing Transcript at 137-38).

(10/15/92 Hearing Transcript at 196). Although Colleen's parents can and will pay St. Brigid's tuition, they cannot afford to pay for the support services of a consultant teacher and a teaching aide.

The District has provided speech and occupational therapy to other students at a "neutral" site at St. Brigid's. The parties agree that Colleen may receive such therapy at the parochial school.[4] The District, however, has refused to provide Colleen with a consultant teacher and teaching aide on site at St. Brigid's. This refusal was ultimately upheld by an impartial hearing officer on December 24, 1992, who found that the provision of services on site at a sectarian school would violate the Establishment Clause of the First Amendment of the United States Constitution. (Attachment B to the Complaint). That decision was affirmed by the State Review Officer of the New York State Education Department on March 8, 1993. (Attachment C to the Complaint).

During the pendency of the administrative proceedings[5] and this action, Colleen has had her IEP implemented at a public school, Watervliet Elementary School. The testimony at the administrative hearings shows that

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[4] In fact, the Supreme Court has rejected a First Amendment challenge to a state providing on-site diagnostic speech services at a neutral site. *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977) (noted recently in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462, 2469 n.10).

[5] For purposes of this decision it is unnecessary to summarize the administrative history.

Colleen has profited significantly in this inclusion program. However, her parents continue to seek implementation of the IEP at St. Brigid's.

Presently before the court are cross-motions for summary judgment. Plaintiffs assert that (1) the District's refusal to implement Colleen's IEP at St. Brigid's violates state and federal education law; (2) requiring the District to provide Colleen with a consultant teacher and teaching aide at St. Brigid's does not offend the Establishment Clause of the First Amendment; and (3) the District's denial of such services to Colleen at St. Brigid's violates her free exercise of religion under the First Amendment. Defendants, however, disagree with each of these contentions. After a very careful review of the briefs and the exhibits, this court finds that summary judgment should be granted to the defendant.

I. FEDERAL AND STATE EDUCATION LAW

Plaintiffs contend that federal and state education law entitle Colleen to receive the educational support services identified in her IEP on site at St. Brigid's. I have reviewed the arguments and citations of counsel, but I am persuaded by defendant's arguments to the contrary.

Defendant correctly notes that the regulations implementing the Individuals with Disabilities Education Act (hereinafter the "IDEA") forbid the use of federal funds to pay for "religious worship, instructions, or proselytization." 34 C.F.R. § 76.532(a)(1). The court recognizes that plaintiffs do not seek any services from the District for religion classes or any of the school's religious activities,

such as daily prayers, holiday prayer services, and attendance at First Friday Masses. However, the evidence does not support their assertion that "[r]eligious themes are specifically addressed only in a separate religion class. There is no religious content to any of the courses or activities for which Colleen requires assistance pursuant to her IEP." (Plaintiffs' Rule 10(j) Statement at ¶ 20). Rather, it is clear from the transcripts and exhibits submitted that religious instruction is included in the various academic classes at St. Brigid's. Therefore, section 76.532(a)(1) of the regulations precludes the District from providing the services of a consultant teacher and a teaching aide who would have to modify these classes for Colleen.

The school principal, Ms. Ana Yeomans, testified at her deposition that religious music is typically played during the school's Christmas concert in December and that seasonally there would probably be religious themes to the students' art work (Yeomans' deposition at 19). Moreover, as defendant correctly points out, St. Brigid's written philosophy is that "Our responsibility is to foster the total Christian in a Catholic environment, **Christian morals and principles should permeate all disciplines.**" (Yeomans' deposition at 17) (emphasis added). Yeomans testified that that philosophy is printed on a page from the school's calendar handbook. (Yeomans' deposition at 16). She and the faculty formulated the philosophy, which was presented to the regional school board and pastors for their approval. (Yeomans' deposition at 16). It is usually reviewed by the faculty in the spring. (Yeomans' deposition at 17). Yeomans agreed that the responsibility stated in the philosophy is kept in mind in implementing

the curriculum each year. (Yeomans' deposition at 18). Despite this statement, she incredibly further testified that there is no religious aspect to teaching courses other than religion, although she noted that she "could see where at times there might be an issue raised in an academic course that might generate some values discussion, but not religious beliefs or requirements." (Yeomans' deposition at 23). Her "interpretation of [the philosophy statement] is that we are open to discussion of principals [sic] and values in the classroom in the academic areas if they should arise. That is if they are posed by the student, that we would not be closed to not discussing that." (Yeomans' deposition at 26).[6]

This latter deposition testimony is further contradicted by the minutes of an earlier CSE meeting on May 14, 1992, which summarizes Yeomans' testimony at that meeting. According to these minutes:

> In response to a question by the CSE Chairperson, **Mrs. Yeoman's [sic] testified that religious concepts are introduced during the course of instructional presentations** at St. Brigid's in subjects such as Science, Social Studies, and Health. For example, one might expect the Catholic Church's religious position on abortion and euthanasia to be brought up during class [sic] Science and Health. . . .

(Record on Appeal; Minutes of 5/14/92 CSE meeting) (emphasis added). The minutes of a CSE meeting the

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[6] The court does not believe that the recent inconsistency of Ms. Yeomans warrants a denial of the summary judgment motions due to an issue of material fact.

following week further states that "Mrs. Yeoman's [sic] indicated that although religious issues might be discussed by a St. Brigid's teacher during class discussion, students were not tested on religious concepts during class assignments, or tests." During that meeting she presented the CSE Chairperson with the school's philosophy statement. (Record on Appeal; Minutes of 5/21/92 CSE meeting).

Furthermore, during an administrative hearing on October 15, 1992, Stephen Hennessey, who is a school psychologist employed by the District and is chairperson of the CSE, testified about his discussions with Colleen's parents. He stated:

> We discussed the nature of the classes at St. Brigid's, to what extent religious doctrine is introduced during discussions and in science, social studies and health for example. **Mrs. Yeomans indicated that the teachers do feel free to discuss religious issues to the class, you know, the church's doctrine on abortion and euthanasia.** It is something that could come out during the discussions but not part of the curriculum.

(10/15/92 hearing transcript at 28) (emphasis added).

Later, Colleen's mother testified at that hearing. Her testimony also shows that religious instruction, including the teaching of Christian morality, is part of St. Brigid's academic classes. During her examination she stated in relevant part:

> Q How is religion . . . to what extent is religion taught at St. Brigid's?

A They have religious class every day. They carry out, I guess Christian morality – I'm not sure of the word I want – throughout the day.

Q Is there a religious aspect that is involved in teaching all classes at St. Brigid's?

A Like I said, there's the Christian morality throughout the whole day, you know, but one plus one is two.

HEARING OFFICER: Well, if they have reading, do they read the lives of the Saints instead of Winnie the Pooh?

THE WITNESS: It will include all things. Obviously they're going to study about saints or whatever. It's a Catholic school.

HEARING OFFICER: But outside religion class, that's what I'm saying.

THE WITNESS: For instance, social studies. If they should come upon Roe versus Wade, of course they may discuss what their version of abortion is or what they believe. But they're not going to force that opinion on you. They don't tell you that you can't do this, you know.

. . .

Q Would you say that religious aspects of the school come into play throughout the day.

A To a certain extent, yes. . . . They are not looking for things in science to teach religion about. If these things come up, they bring them up and they talk about them. Religion class is the place for that.

. . .

> Q . . . would you expect that [the church's] views would be taught in the school?
>
> A They teach them their views, but again, they cannot force their opinions on someone. They say this is how the Catholic church feels.
>
> . . .
>
> Q . . . I gather one of the reasons you want Colleen to go to St. Brigid's in addition to being with her sisters, in addition to being benefited by the smaller classes, is so that she can be exposed to the Catholic aspects of things.
>
> A That's right.

(10/15/92 hearing transcript at 207-08; 212; 219). She did testify that she did not expect the consultant teacher to modify any religious aspect of the curriculum for Colleen, but she did not want to diminish the Catholic impact of the education at St. Brigid's. (Transcript at 217, 220-23).

I find that given the school's philosophy and the religious content of the academic classes, federal law forbids the District from using federal funds to provide the services of a consultant teacher and a teaching aide on site at St. Brigid's.

Furthermore, defendant also correctly notes that New York State statutes and regulations do not **require** a school district to provide special education and related services on site at private schools. *Board of Educ. of the Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 187-90 (1988). While plaintiffs note that the State Education Department recognizes that where "the only way to provide meaningful services is on-site of a sectarian

school, such services may be offered at the school" (citing *Handbook on Services to Pupils Attending Nonpublic Schools*), defendant correctly points out that all of the services identified in Colleen's IEP are available at Watervliet. Thus, it is clear that this is not a case where the only meaningful services available are obtainable exclusively at the sectarian school. As defendant states, if Colleen attends St. Brigid's, it will be the result of her parents' voluntary choice. Her attendance will not be because the services required can only be provide [sic] at St. Brigid's and nowhere else. Even if this were not the case, I further find that the provision of the on-site services would violate the First Amendment.

II. FIRST AMENDMENT

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law respecting the establishment of religion. . . . " U.S. Const. amend I. The District asserts that this Establishment Clause prohibits it from implementing Colleen's IEP at St. Brigid's. Plaintiff disagrees.

Interestingly, both parties rely in part upon a recent Supreme Court decision, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993), in support of their differing opinions. *Zobrest* involved a deaf student who asked his school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school pursuant to the Individuals with Disabilities Education Act (IDEA) and its Arizona counterpart. The Supreme Court found that "the Establishment Clause does not prevent the school district from furnishing him

with a sign-language interpreter there in order to facilitate his education." *Id.* at 2469.

In reaching this decision, the Court stated that "[t]he service at issue . . . is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Id.* at 2467. The presence of the interpreter at the Catholic school could not be attributed to state decision-making because "the IDEA creates no financial incentive for parents to choose a sectarian school. . . . " *Id.* The Court stated that "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.*

In addition, the Court distinguished the case at bar from previous decisions, *Meek v. Pittenger* 421 U.S. 349 (1975), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), in two ways. "First, the programs in Meek and Ball – through direct grants of government aid – relieved sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 2468. "Second, the task of a sign-language interpreter **seems to us quite different from that of a teacher** or guidance counselor." *Id.* at 2469 (emphasis added). The Court noted that the interpreter would merely "accurately interpret whatever material is presented to the class as a whole" and thus concluded that he "will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause." *Id.*

In the instant case, as in *Zobrest*, it is clear that the IDEA does not create a financial incentive for Colleen's parents to choose a sectarian school. In addition, providing the services on site would not relieve the school of costs it would have otherwise had to bear in educating its students. However, this case is clearly distinguishable from *Zobrest* because here we are dealing with a teacher and a teaching aide who have to modify the **content** of the academic classes for Colleen. I do not agree with plaintiffs' characterization of the consultant teacher and the aide as mere interpreters of the course materials.[7] Unlike the interpreter in *Zobrest*, these District employees would be teaching or providing teaching support, not just translating the class discussions verbatim. As noted by defendant, unlike an interpreter, the consultant teacher will use his or her judgment in determining how best to present the material to Colleen and will interact with the regular teacher in order to present the materials to Colleen more effectively. Furthermore, the aide would be assisting Colleen in understanding the material presented in class and in focusing her attention to the class activities. Such duties are distinctly different from those neutral, mechanical duties of an employee who would merely be translating verbatim the teachings at the secular school.

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[7] Plaintiffs assert that "[i]n effect, the consultant teacher and the teaching aide serve as Colleen's 'interpreter' – developing and implementing the material so that the lesson plan of Colleen's regular classroom instructor can be effectively communicated to Colleen." (Plaintiffs' memorandum at 19).

In sum, based upon *Zobrest* I agree with the District that the Establishment Clause prohibits it from implementing Colleen's IEP on site at St. Brigid's. As fully discussed above, the academic courses at St. Brigid's include religious material. Thus, by requiring the consultant teacher to modify the academic classes for Colleen, and by requiring the teaching aide to give direct individual teaching support to Colleen in subjects which have religious content, they would be furthering the religious mission of the school. Even though Colleen and her class allegedly would not be tested on the religious content of the classes, and despite Colleen's mother's statement that she does not expect the District employees to modify the religious content of these classes, "[t]he potential for impermissible fostering of religion under these circumstances, although [possibly] somewhat reduced, is nonetheless present." *Meek v. Pittenger,* 421 U.S. 349, 372 (1975). I, therefore, find that the implementation of Colleen's IEP at St. Brigid's will impermissibly result in the direct advancement of religious beliefs by District employees and result in excessive entanglement of church and state.[8]

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[8] For these reasons, it appears that the implementation of Colleen's IEP at St. Brigid's may not meet the second and third prongs of the three-part test, established by the Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which has been used to determine whether there has been an Establishment Clause violation. Under the *Lemon* test, government action violates the Establishment Clause if any of the following three prongs is not satisfied: (1) the government action must have a secular purpose; (2) the action must not have the primary effect of advancing religion; and (3) the action must not create excessive entanglement between church and state. *Id.* at 612-13.

III. FREE EXERCISE OF RELIGION

The First Amendment of the United States Constitution also guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . . " U.S. Const. amend I. Plaintiffs assert that the District's refusal to implement Colleen's IEP at St. Brigid's has forced them to choose between their religious beliefs and receiving benefits under the IDEA. But for her disability, Colleen would be attending the parochial school along with her two sisters. Plaintiffs assert that the State may not burden an individual's sincerely-held religious beliefs unless such restriction serves a compelling state interest. (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). They claim that such an interest does not exist in this case. I agree, however, with defendant that the avoidance of an Establishment Clause violation is a sufficient compelling state interest. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1196 (9th Cir. 1992), *rev'd on other grounds*, 113 S. Ct. 2462 (1993); *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 370 (4th Cir. 1991).

WHEREFORE, for the foregoing reasons, it is

ORDERED, that plaintiffs' motion for summary judgment is denied, and it is further

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Although some Justices have questioned the continued us [sic] of the *Lemon* test, *see Rosenberger v. Rector*, 18 F.3d 269, 282 n.30 (4th Cir. 1994), it is clear that that test has not been overruled or modified. Nevertheless, both parties correctly note that the *Zobrest* Court did not utilize the *Lemon* test, and I have done likewise. I am satisfied that based on the Court's decision in *Zobrest*, the provision of the services of a consultant teacher and a teaching aide would violate the Establishment Clause.

ORDERED, that defendant's cross-motion for summary judgment is granted, and, therefore, it is further

ORDERED, that the Clerk shall enter judgment for the defendant.

IT IS SO ORDERED.

Dated: June 22, 1994
Albany, New York

/s/ Ralph W Smith Jr
United States
Magistrate Judge

APPENDIX E

[SEAL] No. 93-3

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
State Review Officer

Application of a CHILD WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the City School District of the City of Watervliet.

Appearances:

Disabilities Law Clinic of Albany Law School, attorney for petitioners, Nancy M. Maurer, Esq., of counsel

Hicks and Bailly, Esq., attorneys for respondent, Stephen F. Bailly, Esq., of counsel

DECISION

Petitioners appeal from the determination of an impartial hearing officer which upheld the recommendation of respondent's committee on special education (CSE) that the services of a consultant teacher, classroom aide, a speech therapist and an occupational therapist not be provided to petitioners' child at the site of a private school selected by petitioner. The appeal must be dismissed.

Petitioner's eleven year old child is classified as mentally retarded. Her classification is not in dispute. In a May, 1991 psychological evaluation, the child achieved a verbal IQ score of 59, a performance IQ score of 45, and a

full scale IQ score of 48. In April, 1992, the child was assessed to be reading at a mid-first grade level, while her mathematic skills were at the kindergarten level. An independent evaluator testified at the hearing that the child was very adept socially, but that her speech was somewhat difficult for others to understand. The evaluator further testified that the child was academically weak in language and comprehension, and had some small motor deficits which were manifested in tasks such as writing and buttoning.

After attending a special education preschool program, the child was referred to respondent's CSE, which recommended that she be enrolled in a diagnostic development program of the Board of Cooperative Educational Services of Albany, Schoharie and Schenectady Counties (BOCES). The child was enrolled in the BOCES program for two years, after which she was enrolled for three years in a BOCES fundamental skills program.

Petitioners met with the CSE in the Spring of 1991, to request that the child be placed in a class with age appropriate peers for fourth grade during the 1991-92 school year, because they believed that a special class program was too restrictive and did not sufficiently challenge their child. Petitioners requested that respondent provide the child with the services of a part-time consultant teacher, a full-time aide, as well as speech therapy and occupational therapy, at the St. Brigid's Regional School, a parochial school in Watervliet which had been selected by petitioners. In June, 1991, the CSE recommended that the requested services be provided at the St. Brigid's Regional School. However, respondent rejected the CSE's recommendation.

Petitioners requested that an impartial hearing be held to review the action of respondent. In the interim, the child was placed by petitioners in a regular education class in respondent's elementary school, where she received the requested services. In a decision dated January 29, 1992, the hearing officer held that respondent was legally authorized and obligated to provide the requested services at the private school selected by petitioners.

Respondent appealed from the hearing officer's decision. In *Application of a Child with a Handicapping Condition*, Appeal No. 92-14, I annulled the hearing officer's decision, but did not reach the issue of the constitutionality of the provision of the requested services in the private school. I held that the process by which the child's individualized education program (IEP) had been developed was flawed because the child's mother had served as a parent member of the CSE, and that the IEP failed to specify whether the consultant teacher services were direct or indirect, or to identify the areas in which the child was to receive primary instruction from a special education teacher (cf. 8 NYCRR 200.4[c][2][iv]). I also found that the child's IEP should have delineated the responsibilities of the child's regular education and consultant teachers. The CSE was directed to reconsider its recommendation in a meeting to which representatives of the private school were invited to discuss the feasibility and implementation of the proposed program in the private school, and to clarify the role and supervision of the aide, in a manner consistent with the provisions of 8 NYCRR 80.33.

On May 14, 1992, the CSE met with petitioners, the principal of St. Brigid's and the child's prospective fifth

grade teacher at St. Brigid's. The child's fourth grade teacher in respondent's elementary school, who was also at the CSE meeting, told the CSE that the child had successfully participated in the teacher's class, with the assistance of the special educational services. The CSE revised the child's IEP for the 1991-92 school year, and discussed the feasibility of implementing the IEP in the private school. The principal of the private school advised the CSE that the IEP could be implemented in St. Brigid's, if the requested special educational services were provided. The CSE meeting was adjourned without a recommendation for the implementation of the child's IEP. The 1991-92 IEP, which is not part of the present record, was approved by the CSE at a subsequent meeting on May 21, 1992. The CSE again discussed the implementation of the child's IEP in St. Brigid's and then voted to recommend to respondent that the IEP could not be implemented in the private school. The CSE began preparing the child's IEP for the 1992-93 school year, but did not complete that IEP until the CSE's next meeting on May 27, 1992.

The child's IEP for the 1992-93 school year provides that the child be enrolled in a regular education fifth grade class, but receive a curriculum which is modified to meet her needs. The IEP further provides that the child is to receive 30 minutes per day of primary instruction by a consultant teacher for reading, mathematics, and language arts. The consultant teacher is to provide an additional 30 minutes per day of indirect service, consulting with the child's regular education teacher about the child's instruction in reading, English, spelling, penmanship, mathematics, social studies, science and health. The

consultant teacher is also to consult with the regular education teacher regarding the daily activities of a full-time teacher aide, and is to be primarily responsible for supervising the aide's performance of support teaching duties. The aide would provide support teaching in reading, English, spelling, penmanship, mathematics, social studies, science and health. The IEP also provides that the child shall receive three 30 minute periods of speech therapy per week and two 30 minute periods of occupational therapy per week. The child's speech therapist is also to consult with the consultant teacher once each week.

In view of the fact that the parties have stipulated that the child's IEP would be appropriate, I do not reach the issue of the appropriateness of providing only 30 minutes per day of primary special education instruction in reading, mathematics and language arts to the child, or the rationale for also having the child receive instruction in these subjects from her regular education teacher (*Hiller v. Bd. of Ed. Brunswick CSD et al.*, 674 F. Supp. 73 [N.D. NY, 1987]).

The CSE voted to recommend to respondent that the special educational services set forth on the child's 1992-93 IEP could not be delivered in an appropriate manner at the private school in which petitioners wished to enroll the child. Petitioners requested that an impartial hearing be held to review the CSE's recommendation. The record reveals that the child remained in respondent's elementary school for fifth grade during the 1992-93 school year. At the hearing which was held on October 15 and 16, 1992, the parties stipulated that the child's IEP was appropriate and that the hearing officer

should consider the record of the prior hearing in addition to the record to be developed at the new hearing. They further stipulated that respondent would provide speech therapy and occupational therapy to the child at St. Brigid's (cf. *Wolman v. Walters*, 433 U.S. 229; *Filler v. Port Washington UFSD*, 436 F. Supp. 1231 [E.D. NY, 1977]). In view of the parties' stipulation, I do not reach the issue of the provision of those services (*Hiller v. Bd. of Ed., supra*).

In a decision dated December 24, 1992, the hearing officer found that the CSE had prepared the child's IEP in accordance with the directives of my decision in Appeal No. 92-14. The hearing officer noted that little competent evidence had been presented at the hearing with regard to the manner in which St. Brigid's Regional School functioned or the way in which instruction was presented in the school. Nevertheless, he concluded that there was sufficient evidence to determine whether respondent could, consistent with the Establishment Clause of the First Amendment to the U.S. Constitution, provide the services of a consultant teacher and an aide at St. Brigid's. Relying upon the minutes of CSE meetings at which the St. Brigid's principal explained the philosophy and practices of that school, the hearing officer found that the school offered its students a religiously oriented curriculum, and held that providing the services of the consultant teacher and aide at the school would improperly advance religion and result in excessive government entanglement with religion (*Lemon v. Kurtzman*, 403 U.S. 602). The hearing officer further held that the respondent's denial of services to the child at St. Brigid's did not unlawfully abridge petitioners' or the child's rights under

the Free Exercise Clause of the First Amendment to the U.S. Constitution.

Petitioners assert that respondent is required by Federal and State law to provide the services of a consultant teacher and an aide at St. Brigid's school. However, petitioner's assertion that there is such a requirement is, at least, overstated. Federal regulations and state statute require each board of education to provide special education and related services designed to meet the needs of disabled children who reside within the school district and attend private school (34 CFR 300.403 and 300.452; Education Law Section 3602-c). Although petitioners' child was enrolled in respondent's schools when petitioners met with the CSE, petitioners stated their intention to enroll the child in St. Brigid's. Accordingly, respondent's CSE was obligated to offer an appropriate public school placement for the child, and an appropriate program of special education/and or related services if the child enrolled in St. Brigid's (*Application of a Child with a Handicapping Condition*, Appeal No. 91-13).

The U.S. Department of Education has opined that a board of education is not required by Federal law to make suitable educational services available to a child on the premises of the private school which the child attends (Goodall, 16 EHLR 1398; see also, *Goodall v. Stafford County School Board*, 930 F. 2nd 363 [4th Cir., 1991], cert. den. 112 S. Ct. 177). In New York, disabled children who are enrolled by their parents in private schools are eligible to receive special educational services from their respective boards of education pursuant to Section 3602-c of the Education Law. However, Section 3602-c does not require boards of education to provide services on the

premises of the private schools, but allows boards of education to determine an appropriate program for each child, within statutory guidelines and constitutional constraints (*Board of Education Monroe-Woodbury CSE v. Wieder et al.*, 72 NY 2nd 174).

Although a CSE may use its discretion in recommending an appropriate program, it must nevertheless recommend a program which can be implemented (*Matter of a Child with a Handicapping Condition*, 20 Ed. Dept. Rep. 138; *Matter of a Handicapped Child*, 21 *id.* 527; *Matter of a Handicapped Child*, 22 *id.* 571). There is no dispute about the appropriateness of the child's IEP, if the child attends respondent's elementary school. However, the CSE prepared a single IEP for the child, and recommended to respondent that the IEP could not be implemented if the child attended St. Brigid's. A child's IEP is the CSE's recommendation (8 NYCRR 200.4[c]). I find that the CSE's recommendation for petitioner's child is inherently contradictory, with regard to the child's attendance at St. Brigid's. The minutes of the CSE's meeting of May 21, 1992 reveal that the CSE considered, but then rejected, the option of providing some of the IEP services at respondent's elementary school and the rest of the services at the private school. However, the CSE made no recommendation for services to be provided to the child if the child enrolled in St. Brigid's. Therefore, the CSE has not met its obligation to recommend an appropriate program for a child who has been or will be enrolled in a private school (*Application of a Child with a Handicapping Condition*, Appeal No. 91-13).

Although the CSE should have recommended a program which it believed could have been implemented if

the child enrolled in the private school, the resolution of this matter would be needlessly delayed by ordering the CSE to make a new recommendation. The parties agree that the child's IEP prepared by the CSE is appropriate, and that the only area of disagreement is whether the IEP services can be provided on the premises of the private school. While the CSE did not offer any explanation for its recommendation that the IEP could not be implemented, it is readily apparent from the minutes of the CSE meetings and the position taken by respondent at the hearing that the CSE refrained from recommending that the services of a consultant teacher and aide be provided on the premises of St. Brigid's because it believed that respondent was constitutionally precluded from providing those services at the private school. Therefore, I find that it is necessary to reach the constitutional issue (*Goodall v. Stafford County School Board, supra*).

Upon review of the records of the first and second hearings, I find that there is some evidence about the program of the St. Brigid's Regional Catholic School. The CSE minutes of its May 14, 1992 meeting report that the principal of St. Brigid's told the CSE that religious concepts are introduced during the course of instructional presentations at St. Brigid's in subjects such as social studies, science and health, and that children were directed to pray four times each day at the school. At the May 21, 1992 CSE meeting, the principal of St. Brigid's presented the CSE chairperson with a written description of the school's philosophy, in which it was stated that:

> "Our responsibility is to foster the total Christian in a Catholic environment: Christian morals and principles should permeate all disciplines."

Petitioners do not dispute the hearing officer's finding that the private school offers a "religion-permeated academic curriculum." (Decision, page 15). I concur with the hearing officer's conclusion that the record presents a sufficient basis to support a determination of the constitutional issue.

The First Amendment to the United States Constitution reads, in material part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

Since 1948, the provision of the First Amendment have been held to be applicable to State funded assistance to children attending sectarian schools (*Everson v. Board of Education,* 330 U.S. 1).

This appeal presents issues premised upon both the Establishment Clause and the Free Exercise Clause. The Establishment Clause issue arises because petitioners seek to have a public school teacher and a public school aide provide services to their child on the premises of a sectarian private school. In *Lemon v. Kurtzman, supra,* the United States Supreme Court established a three-part test for ascertaining whether government action impermissibly establishes or results in active involvement in religious activity:

1. The government action must have a secular purpose;
2. The action must not have the primary effect of advancing religion; and
3. The action must not create excessive entanglement between church and state.

In applying the three-part *Lemon* test to both Federal and State funded activities, the Supreme Court had held that the challenged activity is unconstitutional if it does not meet each of the three parts of the *Lemon* standard. In *Lemon,* the Court held that the supervision needed to ensure that publicly funded teachers in parochial schools were not conveying religious messages would constitute an excessive entanglement of church and state. In 1975, the Court reached the same conclusion in invalidating a state program which provided guidance, testing, remedial and therapeutic services by school district employees on the premises of pervasively sectarian schools (*Meek v. Pittenger,* 421 U.S. 349). In *Meek,* the Court stated that:

> "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher and the danger that religious doctrine will become intertwined with secular instruction persists." (*Ibid,* at 370).

In 1985, the Court held that a school district's program of providing staff to teach classes to supplement core curriculum courses in sectarian schools and a second program of providing staff to teach voluntary "community education" courses in such schools after regular school hours violated each of the three parts of the *Lemon* test (*School District of the City of Grand Rapids et al. v. Ball et al.,* 473 U.S. 373. In the same year, the Court held that the New York City School District could not constitutionally use Federal funds received under the former Title I of the Elementary and Secondary Education Act of 1965 (now Chapter 1 of the Education Consolidation and

Improvement Act of 1981, 20 USC 3801) to pay the salaries of school personnel, including teachers, psychologists and social workers, who were assigned to parochial schools to provide remedial instruction to educationally deprived children (*Aguilar et al. v. Felton et al.*, 473 U.S. 402). Acknowledging that the board of education had adopted a supervisory system to prevent the Title I program employees from inculcating religious beliefs, the Court held that the supervisory system inevitably results in the excessive entanglement, and noted that:

> "The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause . . . (because) the program necessitates 'frequent contacts between the regular and the remedial teacher . . . in which each side reports on individual student needs, problems encountered, and results achieved' . . . " (*Ibid* at 412).

The U.S. Department of Education has expressed the opinion that it would not "presume" to extend the ruling of the *Aguilar* decision to the provision of services to disabled children at the site of private schools pursuant to 20 USC 1400 et seq. (Orschel, 16 EHLR 1368). Nevertheless, two United States Circuit Courts of Appeal have held that the provision of interpreters to deaf children in sectarian schools under the authority of 20 USC 1400 et seq. would violate the Establishment Clause of the First Amendment (*Goodall v. Stafford County School Board, supra; Zobrest v. Catalina Foothills School District*, 936 F. 2nd 1190 (9th Cir., 1992). In *Zobrest*, the Court noted that even if the presence of a publicly funded interpreter were

limited to classes in which secular subjects were taught, i.e. other than religion, it could not be sustained because the supervision necessary to prevent the use of the interpreter to advance religion would require an excessive entanglement of church and state.

The *Zobrest* case is now pending before the U.S. Supreme Court. Whether the Court will adhere to the *Lemon* test, or articulate a new standard as some have urged, remains to be seen. At present, I am constrained to apply the *Lemon* test to the facts of this appeal. The educational program which the CSE designed for this child was described at the hearing as an inclusion program. Petitioners' expert witness testified about the purpose of the inclusion program and the duties of the consultant teacher as follows:

> "Well, the idea in providing a program for students in the regular classroom is to make use of the activities that exist in there but to modify either the input or the output, whatever the student is doing so that it is directly related to what she needs to learn. It is the same sort of modification but tied to what the other students are doing. In some ways it is very similar to what we do with groups of students who have various learning disabilities. We make the activities similar, related, but distinct for each group's needs or for each individual's needs.
>
> So, a consultant teacher would take charge of designing those specific activities in working with the regular classroom teacher to decide where in the schedule and which aspect of the IEP would be delivered." (Transcript, p. 141)

The child's program would be based upon the curriculum of St. Brigid's, with modifications as directed by the child's IEP and determined by the consultant teacher. It is an inescapable conclusion that the daily consultation between the consultant teacher and the child's regular education teacher at St. Brigid's could not be sustained under the third part of the *Lemon* test. The primary instruction which the consultant teacher would provide the child as a direct service cannot be analytically distinguished from the remedial instruction involved in *Aguilar,* and the supervision necessary to ensure that such instruction does not inculcate religion compels me to conclude that the provision of such instruction would not satisfy the third part of the *Lemon* test.

While the classroom aide would be ostensibly assigned to the child to support the special education program provided by the consultant teacher, the IEP discloses that the aide would assist the child in subjects for which she would not receive special education. In view of the private school's stated purpose of introducing religious concepts throughout the curriculum and the virtual absence of any public school supervision of the aide's activities, there is a substantial likelihood of advancing religion under the second part of the *Lemon* test. The activities of the classroom aide in support of the child's education program are clearly distinguishable from those of the personal hygiene aide involved in *Application of Bd. of Ed. City School District City of New York,* 24 Ed. Dept. Rep. 155, upon which petitioners rely.

Petitioners assert that the hearing officer erred in not balancing the competing constitutional interests of petitioners and respondent. They contend that their right to

freely exercise their religion has been circumscribed by respondent's refusal to provide their child with services at St. Brigid's compelling them to keep the child enrolled in respondent's elementary school. Petitioner's reliance upon Free Exercise Clause of the First Amendment is unavailing. Infringement by the government upon free exercise of religion is subject to strict scrutiny, and can be justified only by a compelling state interest. However, the avoidance of a violation of the Establishment Clause is a compelling state interest (*Goodall v. Stafford County School Board, supra; Zobrest v. Catalina Foothills School District, supra*).

Upon the record before me, I must uphold the hearing officer's decision.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 8, 1993

/s/ Henry A. Fernandez
HENRY A. FERNANDEZ

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of June, one thousand nine hundred and ninety-six.

Present: HONORABLE JAMES L. OAKES,
HONORABLE RALPH K. WINTER,
HONORABLE JOHN M. WALKER,
(SEAL)

Circuit Judges.

COLLEEN RUSSMAN, a child with disabilities, by her parents, PATRICIA and PAUL RUSSMAN,
Plaintiffs-Appellees,

- v. -

No. 95-7756

THOMAS SOBOL, as Commissioner of the New York State Education Department,
Defendant,

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Defendant-Appellant.

ORDER AMENDING OPINION

It is hereby ORDERED that the original opinion is amended on page 5139, lines 11-12 to read:

". . . disabled children voluntarily in private schools."

/s/ James L. Oakes
Hon. James L. Oakes, U.S.C.J.

/s/ Ralph Winter
Hon. Ralph K. Winter, U.S.C.J.

/s/ John M. Walker
Hon. John M. Walker, U.S.C.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of August one thousand nine hundred and ninety-six.

Russman

v Dkt No: 95-7756

Bd of Ed./Watervlt

(Filed Aug. 19, 1996)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Board of Education/Watervliet.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn frm

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

MANDATE

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June, one thousand nine hundred and ninety-six.

PRESENT: HON. James L. Oakes
HON. Ralph K. Winter
HON. John M. Walker, Jr.
Circuit Judges

Docket No. 95-7756

COLLEEN RUSSMAN, a child with disabilities by her parents, PATRICIA and PAUL RUSSMAN,

Plaintiffs-Appellees,

V.

THOMAS SOBOL, as Commissioner of the New York State Education Department,

Defendant,

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL
DISTRICT OF THE CITY
OF WATERVLIET, NEW YORK,

Defendant-Appellant.

(Filed June 12, 1996)

Appeal from United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

A TRUE COPY
GEORGE LANGE III,
CLERK

/s/ George Lange III

For the Court
GEORGE LANGE III, Clerk
By:
/s/ Beth J. Meador
Beth J. Meador
Administrative
Attorney

ISSUED AS MANDATE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Petitioner,

-v-

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari should be granted to a review a question petitioner specifically conceded below as to the responsibilities of school districts, pursuant to the Individuals With Disabilities Education Act, to provide on-site services to students with disabilities in private schools when such services are not prohibited by the Establishment Clause.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Colleen Russman, requests that the Court deny the Petition for a Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Second Circuit. The Court of Appeals opinion is reported at 85 F.3d 1050 and reproduced as Appendix A to the Petition for a Writ of Certiorari at 1a-16a.

The opinion of the United States District Court for the Northern District of New York is reported at 22 IDELR 1028 (1995) and is reproduced as Appendix B to the Petition at 17a-29a. The opinion of the Magistrate Judge of the United States District Court for the Northern District of New York is reported at 22 IDELR 1 (1994) and reproduced as Appendix D to the Petition at 32a-47a. The decision of the New York State Review Officer is reported at 22 IDELR 731 (1993) and reproduced as Appendix E at 48a-62a.

JURISDICTION

Petitioner presents no justiciable controversy. Since the petitioner has effectively waived its constitutional claim and conceded its statutory claim below, there is no case or controversy for this Court to review.

STATUTORY AND REGULATORY PROVISIONS

The relevant constitutional, statutory and regulatory provisions in addition to those indicated by petitioner include the following:

United States Constitution, Article III, §2, Cl. 1.
The judicial power shall extend to all cases in law and equity arising under this Constitution, the Laws of the United States, ... —to Controversies ... between a State, or the Citizens thereof ... .

Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq.
20 U.S.C. §1400(c) Purpose. It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

Education of Children with Disabilities (IDEA) Regulations, 34 C.F.R. Part 300

34 C.F.R. §300.452 Each L[ocal] E[ducational] A[gency] shall provide special education and related services designed

to meet the needs of private school children with disabilities residing in the jurisdiction of the agency. (The word "designed" was omitted from petitioner's statement.)

Education Division General Administrative Regulations (EDGAR) 34 C.F.R. Part 76.[1]

§76.650 (a)	**Private schools; purpose of Secs. 76.651-76.652.**
§76.652	**Consultation with representatives of private school students.**
§76.653	**Needs, number of students, and types of services.**
§76.654	**Benefits for private school students.** **§76.654(b) Same benefits** **§76.654(c) Different benefits**
§76.655	**Level of expenditures for students enrolled in private schools.**
§76.656	**Information in an application for a subgrant.**
§76.657	**Separate classes prohibited.**
§76.658	**Funds not to benefit a private school.**
§76.659	**Use of public school personnel.**

[1]The full text of the following regulations is set forth in Appendix A.

New York Education Law §3602-c(2)
Boards of Education of all school districts of the State shall furnish services to pupils who are residents of the state and who attend nonpublic schools located in such school districts, upon the written request of the parent, ...

STATEMENT OF THE CASE

The main issue to be considered by this Court is whether the petitioner school district, after admitting before the Court of Appeals that it is required pursuant to the IDEA to provide on-site supportive services to children with disabilities attending private schools, can now resurrect its abandoned claim and assert that the IDEA does not require such services.

Facts of the Case

The respondent, Colleen Russman, is a child with disabilities who seeks supportive educational services from her school district, the Enlarged City School District of the City of Watervliet (school district) pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, and New York Education Law §3602-c so that she may attend a private parochial school with her siblings. There is no dispute between the parties as to the nature of Colleen's disability or the nature of the services she should receive. The parties agree that Colleen should be in a inclusion program in which she is educated with same age peers in a regular classroom. The parties also agree that in order to benefit from her education, Colleen requires the

services of a part-time special education consultant teacher to modify academic curriculum, a teaching aide to provide individual support in academic areas, and speech and occupational therapy. The parties disagree, however, as to where the services must be provided. The school district has refused to provide Colleen the support services she needs at St. Brigid's Regional Catholic School (St. Brigid's), thereby forcing her to forgo her private placement.[2]

Starting in 1991, Colleen, through her parents, commenced due process proceedings, including two impartial hearings and appeals to the State Review Officer of the New York State Education Department, in order to contest the school district's denial of services at the private school. In July of 1993, after exhausting administrative remedies, Colleen commenced this action in the United States District Court challenging the denial of services as violating her rights under the Individuals With Disabilities Education Act (IDEA) 20 U.S.C. §1413, New York Education Law §3602-c, and the Free Exercise Clause of the First Amendment to the United States Constitution.

Contrary to the school district's present assertions, the refusal to provide services to Colleen at St. Brigid's has always been based solely on its alleged concern that such on-site assistance is prohibited by the Establishment Clause of the First Amendment, and not on its "understanding that nothing in the federal or state law required the District to provide on-site services." (Petition at 6.) As the record

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[2]Colleen, now 15 years old and in 9th grade in the Watervliet public schools, is no longer eligible to attend St. Brigid's which serves grades kindergarten through eighth grade. Since Colleen is still school age, however, her parents may elect to send her to a different private school in the future.

reflects, the Establishment Clause is the only explanation ever offered by the school district for its refusal to implement Colleen's program at the private school.

The State Review Officer observed in his 1993 decision, for instance, that:

> [w]hile the CSE [school district's Committee on Special Education] did not offer any explanation for its recommendation that the IEP could not be implemented, it is readily apparent from the minutes of the CSE meetings and the position taken by [the school district] at the hearing that the CSE refrained from recommending that the services of a consultant teacher and aide be provided on the premises of St. Brigid's because it believed that [the school district] was precluded from providing those services at the private school. (P. App. E at 56a.)

Moreover, the school district specifically conceded in oral argument before the Second Circuit that the Establishment Clause was the sole reason for refusing services to Colleen. In response to questions from the Second Circuit panel, Stephen Bailly, counsel for the district, stated as follows:

Judge Walker:	In the argument you are making, you don't seem to be contesting the fact that if this were not a parochial school, if it were just a private school, nonsectarian, that you would be required to provide such services; is that correct?
Mr.Bailly:	That is correct.

Judge Walker: So your defense is solely based on the Establishment question.

Mr. Bailly: Yes your Honor. That is why I am addressing it now.

(Transcript of Oral Argument, R. App. B at 6ra-7ra.)

The Decision Below

The United States Court of Appeals for the Second Circuit held that the Establishment Clause presents no bar to the on-site provision of special education and related services to children with disabilities attending private religious schools. The Court found that:

> [t]he only reason offered by the district for the denial of services is its view that the Establishment Clause prohibits the on-site provision of such services at a parochial school... (P. App. A at 15a-16a.)

The school district does not challenge the Court's holding on the Establishment Clause.

The Court of Appeals also addressed the requirements of the IDEA in its decision and determined that, pursuant to the IDEA, Colleen Russman is entitled to receive the special education support services which the parties agree are necessary and appropriate for her, on the site of the private school selected by her parents. The Court of Appeals stressed in this discussion that "the statute and regulations require necessary services be provided to private school children according to their needs rather than the name of their school." (P. App. A at 14a.)

The Court, "[did] not take the position that the IDEA requires the on-site provision at private schools of any and all services that might be required in the context of public education..." (P. App. A at 12a.) The Court stated, however, that school districts may deny on-site services only when providing services at the private school "would entail significant additional costs..." (P. App. A at 14a.)

Although the school district agreed before the Court of Appeals that the IDEA requires that services be provided at the private school, this is the only question raised by the district for writ of certiorari.

REASONS FOR DENYING THE PETITION

1. CERTIORARI SHOULD BE DENIED IN THIS CASE SINCE THE PETITIONER SPECIFICALLY CONCEDED IN OPEN COURT THE ONLY ISSUE IT SEEKS TO REVIEW.

This Court has made clear that, out of necessity, its jurisdiction to review cases by way of certiorari is quite limited. The Court's jurisdiction was not designed to "merely ... give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923). Indeed, Supreme Court Rule 10 limits certiorari to cases in which a petitioner presents "special and important" reasons. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *Monrose v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

Certiorari should be denied in the case at hand because the petitioner has not presented any ongoing issue in this litigation. Instead, the petitioner attempts to seek another hearing on an issue it conceded in the court below.

a. The school district conceded below that the IDEA mandates services to children with disabilities in private schools, as long as there is no Establishment Clause prohibition.

The school district admitted before the United States Court of Appeals for the Second Circuit that it is required to provide IDEA services on site to private school pupils with disabilities. (R. App. B at 5ra, Partial Transcript of Oral Argument.) Having conceded this point below, the district should be precluded from now seeking a writ of certiorari on the same issue before the United States Supreme Court.

This Court has stated that it will deny certiorari where, as here, the petitioner concedes the issue in question. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989). In *Canton*, the petitioner, a municipal defendant in a civil rights action, conceded below that inadequate training is a means of establishing municipal liability, but later challenged this conclusion in its petition for certiorari. Although the Supreme Court accepted review of this case, the Court indicated that certiorari may have been denied had the petitioner's concessions been brought to the Court's attention. *Canton* at 385. Likewise, in *Moose Lodge No. 17 v. Iris*, 407 U.S. 167, 170 (1972), the Court explained that an explicit renunciation of a claim justifies a conclusion that there is no longer a "case or controversy concerning that claim." See also, *Rose v. Mitchell*, 443 U.S. 545, 573-74

(1979) (Normally, a "flat concession" might be given preclusive effect.)

Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), a case much like the present, the school district was precluded from raising alternative statutory defenses to its failure to provide a sign language interpreter pursuant to the IDEA to a child with hearing impairments attending a private parochial school. As in the present case, the *Zobrest* school district refused to provide the interpreter, arguing that it was precluded from doing so by the Establishment Clause of the First Amendment. The school district attempted to argue for the first time before this Court that, even if the Establishment Clause does not bar the provision of the requested service on site, the IDEA and regulations do not require it. This Court, however, declined to consider the statutory defenses and limited its review to the constitutional issues which had been the basis of the school district's position all along.

As this Court noted in *Zobrest*, "[the district] may well have waived these other defenses. For in response to an interrogatory asking why it had refused to provide the requested service, [the district] referred only to the putative Establishment Clause bar." *Id.* at n.6. The Court further pointed out that:

> In our view, this belated contention [regarding the IDEA] is entitled to little, if any, weight here given respondent's repeated concession that, but for the perceived federal constitutional bar, it would have willingly provided [the child] with an interpreter at [the parochial school] as a matter of local policy. *Id.* at n.8.

In the present case, the Watervliet School District made the identical concession regarding the IDEA before the Court of Appeals for the Second Circuit. Within the first minutes of oral argument, counsel for the school district conceded that the IDEA requires the school district to provide services to the respondent, Colleen Russman, on site at the private school selected by her parents. Counsel further acknowledged that its sole defense for not providing such services to Colleen was the Establishment Clause of the First Amendment. (R. App. B at 5ra, Partial Transcript of Oral Argument.)

The school district clearly acknowledges that the IDEA mandates services to students with disabilities who, like Colleen Russman, seek to attend private schools. The school district, having abandoned its claim below that such services are only discretionary, should not now be permitted to resurrect the issue before the Supreme Court. Like the school district in *Zobrest*, Watervliet has waived this defense.

b. Since the school district does not seek review of the Court's holding that the Establishment Clause is no bar to the provision of IDEA services on the premises of a private sectarian school, this defense is also waived.

Supreme Court Rule 14.1 provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Since the school district does not present any question related to the constitutional issues in this case, such issues are also waived.

The Court of Appeals stated in its decision, "the only reason offered by the district for the denial of services is its view that the Establishment Clause prohibits the on-site provision of such services at a parochial school, an issue disposed of above." (P. App. A at 15a-16a.) Since the Establishment Clause issue was resolved by the Second Circuit, and the district does not challenge this holding, there is no reason to review the decision of the Second Circuit Court of Appeals at all.

The school district's petition for writ of certiorari on the IDEA is merely an attempt to change its legal position in light of the recent decision from the United States Court of Appeals for the Seventh Circuit in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996). In view of the district's acceptance of the IDEA mandate, however, *K.R. v. Anderson* should have no impact.[3]

This Court should not overlook the fact that the Establishment Clause was the underlying reason for the dispute in the first place, yet it is not even raised in this petition. The school district should not be permitted to confuse the issues before the Court by switching the rationale for its decision and failing to disclose its prior concessions.

c. There is no case or controversy between the parties presently before this Court.

By conceding that the IDEA does indeed mandate services to private school children with disabilities, and by

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[3] Respondent has consistently asserted the *KR v. Anderson* should have no bearing on the Court's decision. (R. App. C at 8ra, Letter dated May 7, 1996 from Respondent's counsel to the U.S. Court of Appeals.)

failing to seek review of the Court of Appeals determination that the provision of services in question is constitutional, the school district has in essence rendered this case moot. There is no case or controversy between the parties left to be determined.

Article III of the United States Constitution limits judicial power to review of "cases" and "controversies." It is well established that the judiciary is limited to determining rights and obligations between parties that are actually controverted. *See e.g., U.S. BanCorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994),(citing *Mills v. Green*, 159 U.S. 651, 653 (1895)); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); and *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (citing *California v. San Pablo & T.R. and Co.*, 149 U.S. 308, 314 (1893)). Because the petitioner school district has conceded the single issue over which it seeks certiorari, there simply is no justiciable controversy between the parties.

2. THE PETITION SHOULD BE DENIED BECAUSE THE RECORD BELOW IS INADEQUATE TO FULLY ADDRESS THE APPLICATION OF THE IDEA AND REGULATIONS WITH RESPECT TO CHILDREN WITH DISABILITIES VOLUNTARILY ENROLLED IN PRIVATE SCHOOL.

a. There are no facts or evidence in the record to support the school district's denial of services to Colleen Russman pursuant to the IDEA, since the denial has always be premised on the Establishment Clause.

This Court has held that a writ of certiorari should not be granted "where the record is not sufficiently clear and specific to permit decision" of the issues involved in the case. *Massachusetts v. Painter*, 389 U.S. 560, 561 (1968). A record which is "too opaque" or "too sketchy" does not provide the Court with enough information to adequately resolve an important federal issue. *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

As discussed above, throughout this litigation, the sole rationale offered for denying IDEA services to Colleen has been the Establishment Clause, and not the IDEA. Consequently, the record below contains few facts or allegations specific to the requirements of the IDEA or regulations.[4] Despite the comprehensive statutory and regulatory scheme, there is virtually no record in this case with regard to the school district's conduct pursuant to that scheme.

The State Review Officer stated, for example, that "the CSE did not offer any explanation for its recommendation that the IEP could not be implemented [at the private school]...." (P. App. E at 56a.) The State Review Officer also observed that the school district recommended a program that it believed "could not be implemented if the child attended St. Brigid's.... I find that the [district's] recommendation for Colleen is inherently contradictory ...." (P. App. E at 55a.)

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[4] For example, 34 C.F.R. §76.652 requires districts to consult with representatives of private school students in order to determine, among other things, which children require benefits, the children's needs, and the types of benefits to be provided. The record is silent with regard to any such consultation or compliance.

The lack of a full record concerning the school district's rationale for not providing special education services on site at a private school, makes the case at hand an inappropriate one for establishing any national precedent affecting children with disabilities.

b. The decision of the Court of Appeals requiring the school district to provide Colleen Russman with a consultant teacher and aide at St. Brigid's in accordance with the IDEA, was based on the school district's failure to make any factual claim that such services are not required.

The Court of Appeals identified several factors to be considered pursuant to the IDEA in determining the nature and location of services to children with disabilities attending private schools. The first factor is the child's particular needs. As the Court noted, there is no dispute as to appropriate program, needs or services for Colleen in this case. (P. App. A at 4a.) Another factor is cost. The Court determined that school districts have discretion to deny on-site provision of services at a private school where "economies of scale in providing the services at one place exist" or "where significant additional costs" attend the provision of services at the private location. (P App. A at 4a.) In this case, the Court found:

> [t]urning specifically to the facts of the present case, no claim is made by the school district that providing Colleen Russman with a teaching consultant and teaching aide at St. Brigid's is significantly more expensive than providing the same services at the public school. (P. App. A at 15a.)

The school district offered no rationale for denying services to Colleen under the IDEA. There was no indication that providing services on site would be problematic, costly, or ineffective. Since the Court of Appeals' ruling was limited to the specific circumstances of this case, it need not be reviewed.

3. BECAUSE THE COURT OF APPEALS DECISION IN THIS CASE IS CORRECT, IT SHOULD REMAIN UNDISTURBED.

The school district misconstrues both the substance and basis of the Court of Appeals decision. As is evident from the decision itself, the Court of Appeals' reasoning is based on the purpose and plain language of the IDEA and accompanying regulations in their entirety, and not, as the school district asserts, "on its own singular interpretation of an isolated regulatory provision." (Petition at 12.)

The Court of Appeals relies on the statute, 20 U.S.C. §1413(a)(4)(a), and notes:

> [t]he statute imposes somewhat different obligations regarding disabled children who are voluntarily placed in private school. It requires states to 'provid[e] for such children special education and related services.' However, this obligation is limited by the phrase 'to the extent consistent with the number and location of' such children in a state. (P. App. A at 9a.)

It is this specific statutory language which provides the foundation for the Second Circuit Court of Appeals decision.

The Second Circuit finds that the school district's discretion to refuse to provide services on site to private school children is limited pursuant to the IDEA, 20 U.S.C. §1413 and the regulations to instances in which, due to numbers and location of students with disabilities, "economies of scale in providing the services at one place exist" or "provision of services at a distant private school would entail significant additional costs... ". (P. App. A at 14a.) As the Court states:

> Where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools. The statute and regulations require that necessary services be provided to disabled private school students according to their needs rather than the name of their school.... (P. App. A at 14a.)

The school district incorrectly characterizes the Court of Appeals' decision as based solely on the regulation requiring "comparability in quality, scope, and opportunity for participation to the program benefits that the [district] provides for students enrolled in public school." 34 C.F.R. §76.654(a). (Petition at 12) The Court does indeed refer to the EDGAR "comparability" regulation. However, this regulation is consistent with, and further supports, the Court's analysis of the IDEA scheme as a whole. The Court states:

> Use of the word 'comparable' strongly suggests that the provision of services will usually take place outside the public school. Otherwise, the regulation would simply provide that any services for the disabled available at a public school must be open to private school students. (P. App. A at 15a.)

Further, the Second Circuit does not state, as the school district suggests, that "comparable benefits" must be "identical." (Petition at 15.) In fact, the Court confirms that, "...we do not take the position that the IDEA requires the on-site provision at private schools of any and all services that might be required in the context of public education..." (P. App. A at 12a.)

The interpretation of the IDEA now urged upon the Court by the school district in this case is inconsistent with the very purpose of the IDEA. Nowhere in the statute or regulations, as the petitioner argues, are school districts given full and unfettered discretion to deny without reason, essential special educational or related services to children with disabilities because they attend private school. As the Court of Appeals concludes:

> [i]f public school authorities may freely refuse to provide such benefits at private school, therefore, disabled students must either forgo the IDEA benefits, bear their cost, or transfer to the public school. This result, however, seems to be precisely what the statute and regulations seek to preclude. Indeed, the principal purpose of the statutory and regulatory commands appears to make a child's disability irrelevant to the family's

choice of school, at least where differences in costs of provision do not exist. (P. App. A at 15a.)

4. PETITIONER FAILS TO SHOW A CONFLICT IN THE CIRCUITS WHICH WOULD AFFECT COLLEEN'S RIGHT TO RECEIVE SPECIAL EDUCATION SERVICES AT THE PRIVATE PAROCHIAL SCHOOL.

Since the school district conceded that, but for their First Amendment objections, they would provide services to Colleen at a parochial school pursuant to the IDEA, any discussion by the Court as to Colleen's rights under the IDEA is dicta and does not conflict with the direct holding from other circuits.

The only issue that really needed to be addressed by the Court of Appeals to dispose of this case was whether the school district is prohibited by the Establishment Clause from providing IDEA services, specifically a special education consultant and a teaching aide on the site of a parochial school. The Court of Appeals held that such services are constitutional. This decision is fully consistent with well established Supreme Court precedent including *Zobrest*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); and *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510 (1995).

Since *Zobrest*, there has been no conflict in the Circuits with regard to the impact of the Establishment Clause on the receipt of IDEA services at private sectarian

schools. The Seventh Circuit in *K.R. v. Anderson*, 81 F.3d 673 (7th Cir. 1996), did not address the Establishment Clause even though K.R. attends a religious school. Similarly, the District Court in *Cefalu v. East Baton Rouge Parish School Bd.*, 907 F. Supp. 966 (M.D. La. 1995), a case presently on appeal to the Fifth Circuit, did not address a constitutional issue although the child attended a religious school. The only decision in potential conflict is *Goodall v. Stafford County Sch. Dist.*, 930 F.2d 363 (4th Cir.), *cert. denied* 502 U.S. 864 (1991), which was decided prior to *Zobrest* and on statutory grounds. As the Second Circuit recognizes, *Goodall* is "unpersuasive." (P. App. A at 12a.) Central to the *Goodall* decision denying a sign language interpreter at a parochial school, was the Court's interpretation of 34 C.F.R. §76.532 which prohibits the use of IDEA funds for religious instruction. Since *Zobrest* determined that this regulation is co-extensive with the Establishment Clause, it did not impose any stricter limitation on IDEA funds. *Zobrest*, 509 U.S. at 7 n.7. In any event, the Second Circuit's decision on the Establishment Clause, the only holding below critical to the resolution of this particular case, is not questioned by the petitioner and, therefore, does not warrant review.

Even if this court finds that there is a conflict in the circuits with regard to the IDEA, this case is not the proper vehicle for review because the outcome would be the same regardless of any federal conflict due to Colleen's right to receive the on-site services she needs pursuant to New York State Law. New York Education Law specifically requires school districts to furnish special education services to meet the needs of children with disabilities in non-public schools. N.Y. Educ. L.§

3602-c(2).[5]778 In light of the requirements of State law, even if this Court accepts review and reverses on the federal statute, it is unlikely that such a reversal will affect the position of the parties. The matter would be remanded back for decision regarding New York State claims, and Colleen would again be likely to succeed.

To the extent that the Supreme Court finds that there is a conflict in the circuits, and deems it necessary to clarify the requirements of the IDEA and regulations with respect to pupils in private schools, this Court should do so in the

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[5] N.Y. Education Law §3602-c(2) provides that boards of education, "... shall furnish services to pupils who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent...." N.Y. Educ. L. §3602-c(2) (McKinney 1995). Services include "education for students with handicapping conditions" which is further defined as the provision of special education programs that are designed to meet the needs of children with handicapping conditions. §§3602-c(1)(a) and 3602-c(1)(d). See also, *Application of Board of Educ. of City of New York*, 24 Ed. Dept. Rep. 155, 158-159 (1984), in which the Commissioner of the N.Y. Education Department held that under federal and state law, a school district must provide necessary related services without requiring that a student forgo her private school enrollment.

The petitioner's description of New York Education Law §3602-c as the dual-enrollment law is incorrect. (Petition at 7-8, n.1) The statute provides for services for students at private schools whether or not such students are dually enrolled. The petitioner also misconstrues *Bd. of Ed. of the Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174 (1988), in which the New York Court of Appeals interprets §3602-c as neither mandating nor prohibiting the provision of services solely at the public schools. *Id.* at 186. *Wieder* held that the regulatory scheme contemplates that the "placement of children in programs will be guided generally by their individual educational needs in the least restrictive environment." *Id.* at 188.

context of the Seventh Circuit's decision in *K.R. v. Anderson* or in the context of potential cases presently in litigation in other Courts of Appeals. Two recent district court decisions support the Second Circuit's decision in this case. *See, e.g. Cefalu v. East Baton Rouge Parish School Bd.*, 907 F. Supp. 966 (M.D. La. 1995) presently on appeal to the Fifth Circuit, and *Fowler v. Unified School Dist. No. 259*, 900 F. Supp. 1540 (D. Kan. 1995) on appeal to the Tenth Circuit.[6] One of these cases may provide a better opportunity for the Supreme Court to examine the requirements of the IDEA as applied to private school students with disabilities.

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[6] Petitioner mistakenly observes that other federal district courts, specifically *Tribble v. Montgomery County Board of Educ.*, 798 F. Supp. 668 (M.D. Ala. 1992) (vacated after Joint Motion to dismiss appeal granted (1993)) and *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd on other grounds*, 872 F.2d 153 (6th Cir. 1989), have reached different conclusions to *Fowler* and *Cefalu* regarding the IDEA. *Tribble*, in fact, is fully consistent with *Cefalu* and *Fowler*. *Tribble* determined that "the language and clear intent of the IDEA require that where a child... is placed in a private school or program by his parents the local education agency remains responsible for providing that child with related services required by a particular child's needs." *Tribble* at 672. *Tribble* did not, however, request on-site services. In *McNair*, the court of appeals affirmed the decision denying IDEA services to the child in question due to the fact that the services requested were not related to the disability, but rejected the rationale of the district court. *Id.* at 156. *See also, Natchez-Adams School Dist. v. Searing*, 918 F.Supp 1028 (S.D. Miss. 1996) (private school student entitled to on-site occupational therapy).

CONCLUSION

As argued above, the decision of the Second Circuit is correct and should stand. More significantly, the case at hand is fraught with jurisdictional problems based on the school district's concession concerning the issue challenged. In addition, the record in this case is undeveloped with regard to the school district's compliance with the IDEA and its rationale pursuant to the IDEA for refusing to provide Colleen Russman the services she needs. The substantive and procedural difficulties presented by this case make it inappropriate for Supreme Court review.

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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Albany Law School
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Dated: Albany, New York
December 18, 1996

APPENDIX

APPENDIX A

34 C.F.R. §76.650 Private schools; purpose of Secs. 76.651-76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Secs. 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

34 C.F.R. §76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate repre-sentatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

34 C.F.R. §76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

34 C.F.R. §76.654

(b) *Same Benefits*. If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

34 C.F.R. §76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives the benefits under the program.

(b) The subgrantee shall spend a different average amount on a program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

34 C.F.R. §76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with §76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

34 C.F.R. §76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

34 C.F.R. §76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:
(1) The needs of a private school; or
(2) The general needs of the students enrolled in a private school.

34 C.F.R. §76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities.
(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and
(b) If those benefits are not normally provided by the private school.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---x

IN THE MATTER OF THE APPEAL OF
COLLEEN RUSSMAN, A CHILD WITH
DISABILITIES, BY HER PARENTS,
PATRICIA AND PAUL RUSSMAN,
Plaintiffs-Appellees,

-against- Docket No. 95-7756

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL DISTRICT
OF THE CITY OF WATERVLIET,
Defendant-Appellant

and

THOMAS SOBOL, as Commissioner
of the New York State Education
Department,
Defendant.

---x

February 1, 1996

Before:

HON. RALPH K. WINTER
HON. JAMES L. OAKES
HON. JOHN M. WALKER, JR.,
Circuit Judges

APPEARANCES:

DISABILITIES LAW CLINIC OF ALBANY LAW SCHOOL
Attorneys for Plaintiffs-Appellees
BY: NANCY M. MAURER
CORY HAINES, Law Intern

HICKS & BAILLY
Attorneys for Defendant-Appellant Board of Education
BY: STEPHEN F. BAILLY

PAGE 2/

JUDGE WINTER: We will hear Russman against Board of Education.

MR. BAILLY: May it please the Court, my name is Stephen Bailly and I am here representing the Watervliet City School District. I would like to address the constitutional issue that has been raised on this appeal.

The district judge below improperly interpreted the *Zobrest* decision of the United States Supreme Court in holding that the school district is required to provide a consulting teacher and full-time student aide to the plaintiff, Colleen Russman, a disabled child –

JUDGE WALKER: In the argument you are making, you don't seem to be contesting the fact that if this were not a parochial school, if it were just a private school, nonsectarian, that you would be required to provide the services, is that correct?

MR. BAILLY: That is correct.

JUDGE WALKER: So your defense is solely based on the Establishment question.

MR. BAILLY: Yes, your Honor. That is why I am addressing it now.

JUDGE WALKER: My question is, here the

choice that was made to have a teacher's aide and consultant was that of the parents, it was not emanating from the state; correct?

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I ~~(We)~~ hereby certify that the foregoing is a true and accurate transcript, to the best of my ~~(our)~~ skill and ability, from my ~~(our)~~ stenographic notes of this proceeding.

/s/ William Cohen

Official Court Reporter
U.S. District Court

APPENDIX C

[seal]
ALBANY LAW SCHOOL
Disabilities Law Clinic

May 7, 1996

United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

Re: Russman v. Bd. of Ed. of City of Watervliet
Docket No. 95-7756
Argued February 1, 1996
Hon. Winter, Walker and Oakes

Dear Sirs:

This is in response to Appellant, Watervliet School District's letter dated May 2, 1996 advising this Court of the recent decision of the Seventh Circuit in *K.R. v. Anderson Community School Corporation*. This decision should have no bearing on the present case.

The Appellant School District conceded in oral argument that it would have provided a special education consultant and teaching aide to Colleen Russman, a child seeking to attend a private parochial school, if not for the District's concern regarding the Establishment Clause of the First Amendment. Such services are clearly contemplated by the Individuals With Disabilities Education Act (IDEA). Appellant's position is similar to that of the school district in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993). In *Zobrest*, the district had agreed to provide IDEA services to a child at a private parochial school if permitted to do so pursuant to the Establishment Clause. The district was

later precluded from arguing that it should be excused from providing such IDEA services based on an alternate theory that the services are not mandatory. As in *Zobrest*, the Watervliet School District here should be similarly precluded from changing its position after oral argument.

page 2/

In any case, the recent decision in *K.R.* does not address the requirements of New York Education Law. As argued in Appellee's Brief on Appeal, pursuant to N.Y. Ed. Law Section 3602-c, Colleen is entitled to receive the special education services she seeks at the private school of her choice.

Thank you for your consideration.

Sincerely,

/s/ Nancy M. Maurer

Nancy M. Maurer
Attorney for Appellee,
Colleen Russman

cc: Stephen F. Bailly

MOTION FILED

DEC 19 1996

(3)

No. 96-776

In the
Supreme Court of the United States

October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Petitioner,

v.

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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No. 96-776

In the

Supreme Court of the United States

October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,

Petitioner,

v.

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,

Respondents.

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

The National School Boards Association (NSBA) moves this Court for leave to participate as *amicus curiae* herein, for the purpose of filing the attached brief in support of the Petition for Writ of *Certiorari*. Petitioner has consented to the filing of the brief.

Respondent has been requested to consent, but consent has been refused.

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation. .

Each of the school districts in this nation receives or is eligible to receive federal financial assistance under the Individuals with Disabilities Education ct (IDEA), 20 U.S.C. §§ 1400 *et seq.*. Because recipients of federal funds under the IDEA are obligated to comply with certain conditions specified in the Act and its accompanying regulations, the subject of this case raises issues of great importance to school districts across the country.

The National School Boards Association urges this Court to

grant it leave to present its views.

Respectfully submitted,

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INTEREST OF *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

Each of the school districts in this nation receives or is eligible to receive federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*. Because recipients of federal funds under the IDEA are obligated to comply with certain conditions specified in the Act and its accompanying regulations, the subject of this case raises issues of great importance to school districts across the country.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's misinterpretation of the law will add to the already burdensome cost of special education.

II. The Second Circuit's ruling would force state and local education agencies to bear an inordinate financial load unrelieved by meager federal funding of special education.

III. The Second Circuit's conclusion that the IDEA requires public schools to pay for services to children voluntarily placed in private schools would set a precedent covering all "related services" and auxiliary aids, thereby forcing upon schools an obligation impossible to meet.

IV. The Second Circuit ruling makes it difficult for school districts to rely on the weight of jurisprudence and administrative interpretation when seeking to comply with the IDEA.

ARGUMENT

I. INTRODUCTION

The lower court grossly misinterpreted the Individuals with Disabilities Education Act to require a public school system to provide on site services to a child with disabilities who attends a private institution based on her parents' personal preference and in spite of the public school's offering of a free appropriate public education to the child in a public setting. If this ruling is allowed to stand, it will impose on school districts that have met their obligations under the IDEA a substantial financial burden not contemplated by

the Act and one that they can ill afford given the already tremendous costs of special education. It will further signal to school districts attempting to comply with the IDEA's requirements that they cannot rely on the implementing agency's own interpretation of the law in determining the limits of their obligations under the Act.

II. THE SECOND CIRCUIT'S MISINTERPRETATION OF THE LAW WILL ADD TO THE ALREADY BURDENSOME COST OF SPECIAL EDUCATION.

As the Petitioner has cogently argued in its brief to this Court, the lower court in this case has gravely misread the IDEA and its regulations and ignored administrative interpretations to impose an unequivocal requirement that public school systems pay for on site services to children attending private schools. The seriousness of this error in the law is magnified by its financial implications for public schools. The obligation under the IDEA to educate children with disabilities is an enormously expensive proposition paid for primarily with state and local tax dollars. In the 1992-93 school year, approximately 4.89 million children were served under Part B of the IDEA at a cost of more than $24.25 billion dollars. *See* U.S.

Department of Education, *16th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* xxiv, A-19 (1994) (hereinafter "*16th Annual Report*").

These figures reflect continuing increases in both the number of children served and the dollars spent to educate them. In 1976-77, 4.5% of children from birth through age 21 received services under the IDEA or Chapter 1 of the Elementary and Secondary Education Act; by 1992 this percentage had increased to 6.4%. *Id.* at 7. Likewise the costs have continually grown, more than doubling in ten years; in 1982-83 special education expenditures reached $11.75 billion and by 1992-93 had climbed to over $24 billion. One report estimates that between 1967 and 1991 the percentage of school spending on regular education declined from 80% to 59% of total education dollars, while the percentage spent on special education during that time frame shot up dramatically from 4% to 17%. Of net new money spent on education in 1991, regular education received 26% in contrast to 38% expended for special education. Rothstein, R. & K. Miles, *Where's the Money Gone? Changes in the Level and*

Composition of Education Spending 7-8 (Economic Policy Institute 1995). There is nothing to suggest that these trends will stop or reverse themselves.

Although it is difficult even to estimate the additional expense that school districts would have to incur to pay for so called "related services" desired by children attending private schools by their parents' choice and without regard to the public schools' fulfillment of their obligation to provide a free appropriate public education, it can be safely said that the cost would be substantial by any measure. In *Fowler v. Unified School Dist., No. 259*, 900 F. Supp. 1540 (D. Kan. 1995), the court awarded reimbursement to the plaintiffs in the amount of $15,550.43 for 1994-95 and an additional amount for services for 1995-96. Similarly, in *Goodall v. Stafford County School Board*, 60 F.3d 168, 170 (4th Cir. 1995), the cost of a cued speech translator for a child attending a private school in Stafford County, Virginia, during the 1993-94 school year was estimated to be $14,000. These figures are in stark contrast to an average per pupil expenditure in the United States of approximately $5594 in 1992-93

(latest year for which data available) and to the $8902 per pupil expenditure in New York, one of the highest in the nation. *See* U.S. Department of Education, Office of Educational Research and Improvement, *Digest of Education Statistics 1995*, Table 164 at 164.

Given the current magnitude of expenditures for special education and the ever increasing number of children who are classified as disabled and entitled to a free appropriate public education, absent some clear statutory or regulatory mandate, schools should not also be forced to pay for on site services to children who attend private schools by virtue of their parents uncoerced decision to forego the free appropriate education offered to them by the public school. As Petitioner has pointed out to this Court, there is no such directive in the IDEA or its regulations; the Second Circuit reached a contrary conclusion based on a simplistic analysis.

III. THE SECOND CIRCUIT'S RULING WOULD FORCE STATE AND LOCAL EDUCATION AGENCIES TO BEAR AN INORDINATE FINANCIAL LOAD UNRELIEVED BY MEAGER FEDERAL FUNDING OF SPECIAL EDUCATION.

In enacting the IDEA, Congress recognized the limited financial resources available to state and local education agencies to develop programs for children with disabilities. *See* 20 U.S.C. § 1400(b)(8), (9). When the Education of the Handicapped Act (now Part B of IDEA) was passed in 1975, Congress made a commitment to provide states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess cost" associated with meeting the educational needs of children with disabilities. Unfortunately, Congress has never even come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure. U.S. Department of Education, *Justification of Appropriation Estimates to the Congress Fiscal Year 1993*, at F-19 (1992). At 1992-93 spending levels, Congress provided approximately 8.3% through Part B. To meet the 40% target, Congress would have had to appropriate approximately $9.7 billion as opposed to the approximately $2.2 billion it actually did. *16th Annual Report*, at xxiv. Given the current

financial climate, it is doubtful that Congress will meet its promise any time in the near future.

In light of Congress' failure to provide the state and local education agencies with adequate financial assistance to pay for the costs of special education, any judicial interpretations of the IDEA which inflict additional obligations to pay for services to yet another group of children fall inordinately upon already overburdened local public education budgets. Such a result is especially untenable when it results from a decision that disregards key regulatory language, the weight of case law from other jurisdictions and the clear statements to the contrary from the federal agency responsible for administering the IDEA. Congress, the U.S. Department of Education and courts of appeals that have confronted the issue have recognized that public school systems are not obligated to provide services to children placed voluntarily in private schools by their parents when the public school has already offered those children a free appropriate public education. The lower court's decision would result in siphoning funds from school systems that have already provided appropriate

programs, thereby causing an unjustifiable drain on an already limited amount of funds.

IV. THE SECOND CIRCUIT'S CONCLUSION THAT THE IDEA REQUIRES PUBLIC SCHOOLS TO PAY FOR SERVICES TO CHILDREN VOLUNTARILY PLACED IN PRIVATE SCHOOLS WOULD SET A PRECEDENT COVERING ALL "RELATED SERVICES" AND AUXILIARY AIDS, THEREBY FORCING UPON SCHOOLS AN OBLIGATION IMPOSSIBLE TO MEET.

The lower court's decision in this case ordering the public school system to provide services of a consultant teacher and a teaching aide to disabled students attending a non-public school on-site at the premises of the non-public school, sets a precedent that would require school districts to provide all related services and auxiliary aids to children no matter where their parents enrolled them and regardless of their receipt of special education. Related services are defined under the IDEA as those specified services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401. The lower court cited with approval two district court cases currently on appeal to their respective circuit courts, in which the courts ruled that hearing impaired students are

entitled to sign language interpreters in their private schools. *Cefalu v. East Baton Rouge Parish School Bd.*, 907 F. Supp. 966 (M.D. La. 1995); *Fowler v. Unified School Dist., No. 259*, 900 F. Supp. 1540 (D. Kan. 1995). In neither of those cases were the students receiving special education. Taken to its logical conclusion, this interpretation of the law would create an obligation for public schools to provide whatever "related service" any child needed in whatever private school the child attends.

The implications of such a precedent are vast when one considers the scope of possible related services and auxiliary aids. The statutory definition alone specifies the following: "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling and medical services, except that such medical services shall be for diagnostic and evaluation purposes only). . . and includes the early identification and assessment of

disabling conditions in children." 20 U.S.C. § 1401(17). The regulations add to the list of related services, "school health services" and "parent counseling and training." 34 C.F.R. § 300.16. In a note to this section of the regulations, the Department of Education states: "The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy) . . . Each related service . . . may include appropriate administrative and supervisory activities that are necessary for program planning, management and evaluation."

Under administrative and court rulings, schools have been required to provide such related services as portable personal computer packages (*In re Mary H.*, EHLR 506:325 (SEA 1984)); clean intermittent catheterization (*Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984)); full-time, one-to-one aides (*Thornock v. Boise Independent School Dist.*, 767 P.2d 1241 (Sup. Ct. Id. 1988)); feeding therapy (*City School Dist. of City of New York*, EHLR 502:315 (SEA 1981)); tracheotomy tube reinsertion (*Hawaii*

Department of Education v. Katherine D., 727 F.2d 809 (9th Cir. 1983)); psychotherapy (*In the Interest of Claudia K.*, EHLR 553:260 (Cir. Ct. Il. 1981)); after school community activities (*In re Sara S.*, EHLR 507:308 (SEA 1985)); family travel to residential placement (*Cohen v. Dade County School Board*, 450 So.2d 1238 (3rd Dist. Ct. App. Fla. 1984)); Self-Injurious Behavior Inhibiting System (*Northville Public School*, 16 EHLR 847 (SEA MI 1990)); professional nursing care (*Neely v. Rutherford County School*, 851 F. Supp. 888 (M.D. Tenn. 1994)); and inpatient care at psychiatric hospital (*Manchester School Dist. v. Charles M.F.*, 21 IDELR 732 (D.N.H. 1994)).

The potential scope of related services has been further expanded by virtue of the U.S. Department of Education's adoption of a regulation in 1992 that requires school districts to ensure that assistive technology devices or assistive technology services are made available to children with disabilities when those devices or services are required as part of a child's special education, related services or supplementary aids and services. 34 C.F.R. § 300.308. Assistive

technology device is defined in the statute as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities," 20 U.S.C. § 1401(a)(25); assistive technology service means "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device." 20 U.S.C. § 1401(a)(26). Under these definitions, administrative rulings have required schools to provide calculators (*Letter to Lambert*, 18 IDELR 1039 (OSEP 1992)); hearing aids (*Letter to Seiler*, 20 IDELR 1216 (OSEP 1993)); mechanical reader to transcribe textbooks (*Philip B. v. Houston Independent School Dist.*, No. 177-SE-293 (Tex. Hearing Officer Decision, June 1993)); and large print textbooks (*Letter to Shelby*, 21 IDELR 61 (OSERS 1994)).

Clearly, very few, if any, school districts could sustain the potential cost of providing this enormous array of services to children attending private schools voluntarily. However, that is exactly what

the Second Circuit has cavalierly and erroneously declared is required by the IDEA.

V. THE SECOND CIRCUIT RULING MAKES IT DIFFICULT FOR SCHOOL DISTRICTS TO RELY ON THE WEIGHT OF JURISPRUDENCE AND ADMINISTRATIVE INTERPRETATION WHEN SEEKING TO COMPLY WITH THE IDEA.

In general, school districts try to comply with the mandates of the IDEA. While some of the law's directives are clear on their face (though perhaps less so in individual application), many other areas of special education law have needed the repeated interpretation of the courts and administrative agencies to settle more uncertain issues. In areas where the statutory and regulatory language is unclear, school districts and their counsel justifiably look to rulings of these entities in determining what legal obligations a school district has under the IDEA. However, the Second Circuit's decision below makes such an otherwise prudent approach perilous. In its disregard for the rulings of other circuit courts and its dismissal of the implementing agency's interpretation of its own regulations, the lower court casts school districts into legal quandaries that have no answers, thus forcing them

to take action subject to judicial caprice rather than ordered precedent.

The school district's action in this case is supported by the greater weight of jurisprudence on this issue. Similarly, rulings from the U.S. Department of Education confirm the agreement of the federal implementing and enforcement agency with the acceptability under the IDEA of the school district's position. In *Zobrest v. Catalina Foothills School Dist.*, 115 S. Ct. 2462 (1993), in which the Court held that the Establishment Clause does not prohibit a public school from supplying an interpreter in a private religious school, the U.S. Government's brief argued that "the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option." *Id.* at 2470 (Blackmun, J. dissenting). The Court in *Zobrest*, however, did not reach the question of whether IDEA mandates that interpreter services be provided in private schools.

The Government also filed a brief *amicus curiae* in the Seventh Circuit Court of Appeals in the appeal of *K.R.. v. Anderson*

Community School Corporation, 887 F. Supp.1217 (S.D. Ind. 1995), *rev'd*, 81 F.3d 693 (7th Cir. 1996). That case is currently before this Court on Petition for *Certiorari* (U.S. Aug. 26, 1996) (No. 96-323). The brief filed by the Government in the Seventh Circuit reiterated the Government's position:

> No individual disabled child who is voluntarily enrolled in a private school has an entitlement under IDEA and its regulations to any particular free service from her local school district . . . The stakes here are high. School districts across the country have come to rely on the Secretary's interpretation when devising and implementing their programs for students in private schools; it must be remembered that the overwhelming bulk of money spent on special education is from the state and local level with federal money only a small fraction of the cost. IDEA does create an individual entitlement for any child enrolled in a *public* school. See 20 U.S.C. 1412(1). If, as the district court held a child enrolled in a *private* school also has an individual entitlement, enforceable in court, the costs to local school districts would greatly increase, even while their range of discretion in designing programs decreases. That would impose extraordinarily overreaching financial obligations on states, far beyond their reasonable expectations when they decided to participate in this program.

Brief of the United States in Support of Appellant, *K.R. v. Anderson Community School Corporation*, 81 F.3d 673 (7th Cir. 1996) (No. 95-2497).

This Court has admonished that "the administrative interpretation of the act by the enforcing agency is entitled to great deference," *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-35 (1971). The lower court in this case gave the Government's view little deference.

Burlington School Committee v. Dept. of Educ., 471 U.S. 359 (1985), raised the issue of whether school districts must reimburse parents for the cost of private school tuition in which the parents unilaterally placed their child. This Court ruled that the parents are entitled to reimbursement if the public school *failed* to provide a free appropriate education in a public setting, but the parent would be "barred from obtaining reimbursement" where the school district had proposed an appropriate individualized education program. " This conclusion is supported by the agency's interpretation of the Act's application to private placements by the parents. 34 C.F.R. § 300.403

It would seem to follow that school districts may also rely on the Department's interpretation of the law regarding the obligation to provide "related services" provided to private school students.

While lower courts certainly have authority to clarify the law and reconcile language with application, *Amicus* submits that where judicial precedent, administrative interpretation and financial feasibility all indicate the same result, school districts should be able to rely on these guides in attempting to comply with the law. *Amicus* submits that it is vital that this Court clarify this issue so as to assure school districts of the legal propriety of following established precedent and administrative interpretations.

VI. THE SECOND CIRCUIT'S RULING OVERSTEPS THE BOUNDS OF REVIEW IN IDEA CASES AS ESTABLISHED IN *ROWLEY* BY DECIDING AN ISSUE OF EDUCATIONAL METHODOLOGY.

In its very first ruling under the IDEA (then called the Education of All Handicapped Children Act), *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982), this Court established the scope of inquiry that a court should make in reviewing administrative proceedings. This Court instructed lower courts to consider first,

whether the state complied with the procedures set forth in the Act and second, whether the individual education program developed through these procedures was reasonably calculated to enable a child to receive educational benefits. If the state has complied with these obligations, courts can require no more. The Court further cautioned that courts should avoid imposing their view of preferable educational methods on the states, saying that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id.* at 207-08. In the instant case, there is no dispute that the school district adhered to the IDEA's procedural safeguards and that the individual education program it offered to Colleen Russman met her needs and constituted a free appropriate public education. Under *Rowley* standards, the lower court should have ceased its inquiry and required nothing more of the school district. The choice of enrolling Colleen in a private school was a private choice by her parents. The IDEA requires nothing more than that a free appropriate public education be afforded to her by the school district, while she is enrolled in the public schools. The only

obligation to her as a private school student is that services be available to her at a site selected by the school district.

CONCLUSION

For the reasons stated above, *Amicus* respectfully requests this Court to grant the Petition for *Certiorari.*

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 31 1996
CLERK

No. 96-776

In The

Supreme Court of the United States

October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,

Petitioner,

-against-

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Certiorari should not be denied based solely upon the relatively spontaneous responses of counsel at oral argument which conflict with the record and briefs submitted to the court below as well as the court's own decision.

The Petition for a Writ of Certiorari presents an issue of significant public importance, namely, whether the Individuals with Disabilities Act, hereinafter referred to as ("IDEA"). (20 U.S.C. §§1400 *et. seq.*) and its accompanying regulations, (34 C.F.R. Part 300) require public school districts to provide education and related services to students with disabilities voluntarily enrolled by their parents in non-public schools on the site of such non-public schools. Pet. p. 5. In its Petition for a Writ of Certiorari, petitioner has already set forth that there is a split among the federal circuit courts on this important issue and petitioner will not reiterate this point herein. Pet. p. 18-22. Petitioner maintains that the Writ of Certiorari should be granted.

Respondents, in their Brief in Opposition, argue that certiorari should not be granted because the petitioner's counsel "conceded in open court the only issue it seeks to review." Br. in Opp., p. 8. Specifically, respondents refer to two pages of a lengthy transcript of the oral argument before the Court below, where counsel for the petitioner, Stephen F. Bailly, answered affirmatively to a question from the Court as to whether the district would be required to provide the services at issue to children with disabilities in private schools, as long as there was no Establishment Clause prohibition. Br. in Opp., pp. 6-7.

Respondents, however, failed to include a complete transcript from the entire oral argument and thereby failed to provide this Court with the overall context of Mr. Bailly's statements.

Moreover, respondents fail to acknowledge that petitioner's statutory argument has been maintained throughout the proceedings below and, indeed, most recently, was briefed before the Second Circuit. Indeed, Point II of petitioner's brief which was submitted to the Second Circuit was aptly entitled, "The District Court Erred in Holding that the IDEA Requires the District to Implement Colleen's IEP at St. Brigid's School." Table of Contents from Petitioner's Brief submitted to the Second Circuit Court of Appeals, Petitioner's Reply Memorandum App. A. Furthermore, the Second Circuit Court of Appeals did not find that the petitioner waived its statutory defense at oral argument. In fact, in its decision, the Court explicitly recognized the petitioner's statutory argument when it stated: [t]he school district argues that although the IDEA requires it to provide Colleen with special education services, nothing in the statute or regulations requires that the school district provide the services on site at a private school" Pet. App. p. 10a.

Additionally, and contrary to the respondent's contention, the Second Circuit did not merely speak in dicta when it addressed the issue of whether the petitioner was required under IDEA to provide the contested services on the site of a private school. Br. in Opp., p. 19. Rather, it specifically ruled on this issue when it stated: "[w]e therefore hold that the IDEA requires the school district to provide Colleen with the consultant and aid at St. Brigid's." Pet. App. p. 16a. Since the Second Circuit did

not find that the petitioner had waived its statutory argument, there is no merit to respondents' contention that the issue was waived and that certiorari should be denied.

In support of their argument that a comment made by counsel at oral argument constitutes a waiver of petitioner's statutory argument, respondents cite *City of Canton v. Harris*, 489 U.S. 378, 384-385 (1989); *Moose Lodge No. 17 v. Iris*, 407 U.S. 163, 170 (1972); *Rose v. Mitchell*, 443 U.S. 545, 573-74 (1979); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 7-8 (1993). Br. in Opp., p. 9. However, these cases do not stand for the proposition that a single "concession" made at oral argument, in and of itself, should signal a death knell to a petitioner's Writ of Certiorari, particularly when the alleged conceded argument was fully briefed before the Second Circuit Court of Appeals and counsel for the petitioner, thereafter, made a point of informing that Court of the Seventh Circuit's decision in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), a case in which a Petition for a Writ of Certiorari has also been filed with this Court (96-323) and which presents the same statutory issues which are presented in this case. Letter forwarded by Counsel for the Petitioner to the Second Circuit Court of Appeals, Petitioner's Reply Memorandum App. B.

Respondents cite to this Court's decision in *Moose Lodge No. 17, supra,* to substantiate their assertion that an explicit renunciation of a claim justifies a conclusion that there is no longer a case or controversy. Br. in Opp., p. 9. However, in the present case, there was no explicit renunciation of the statutory defense but merely a single statement made by petitioner's counsel during oral argument

which has been taken out of context. Indeed, despite respondents' reliance on *Moose Lodge, supra,* this Court did not find, under the facts of that case, an explicit renunciation to exist and did not rule that statements made at oral argument by counsel for petitioner will bar a petitioner from being granted certiorari. In fact, this Court stated: "[w]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questions from the Court during oral argument." *Id.* at 170.

Such was the case in *Rose, supra,* another case cited by respondents in support of their position where this Court ruled that a concession made by the State of Tennessee both at oral argument and in its brief that the plaintiffs had made out a prima facie case for discrimination, was insufficient and remanded the case for further proceedings. *Id.* at 573-574.

Respondents argue that *City of Canton, supra,* supports their contention that this Court will deny certiorari where the petitioner concedes the issue in question. Br. in Opp., p. 9. The respondent acknowledges that this Court accepted review of *City of Canton, supra,* despite the fact that the petitioner in that case had made repeated concessions in their briefs to the lower court. *Id.* at 384. As set forth above, the circumstances in the present case are vastly different from those in *City of Canton supra,* in that, here, the petitioner has consistently maintained its statutory defense throughout the litigation and, at most, made an isolated human error at oral argument which was not even interpreted by that Court as a waiver of petitioner's statutory defense. Pet. App. 10a.

Finally, respondents cite this Court's decision in *Zobrest, supra,* for the proposition that petitioner has waived its statutory defenses and that certiorari should be denied. Br. in Opp., pp. 10-11. Respondents inaccurately portray the set of circumstances surrounding the present case with those presented in *Zobrest.* In *Zobrest,* this Court determined that there had been repeated concessions made by the school district that, but for Establishment Clause considerations, it would have provided a disabled student with an interpreter on the site of a parochial school. *Id.* at 7-8. In the present case, as set forth more fully above, no such repeated concessions were made regarding the district being required under IDEA to provide the contested services on the site of the private school.

Thus, the spontaneous response made by counsel for petitioner during oral argument does not demonstrate a waiver of petitioner's statutory defense, but rather, at most, a human error taken out of context. Indeed, this Court has not ruled that a single spontaneous response at oral argument, in and of itself, will preclude a petitioner from being granted certiorari. Given the nation-wide implications of the issue before this Court and the split in the federal circuit courts, petitioners respectfully urge this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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May 2, 1996

FEDERAL EXPRESS DELIVERY

United States Court of Appeals
Second Circuit
United States Court House
40 Foley Square
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Re: Russman vs. Board of Education
Appeal # 5-7756
Argued and Submitted on February 1, 1996

Sirs:

Please be advised that we represent the Appellant, Watervliet City School District in the above referenced appeal. I am writing this letter to bring to the Court's attention the recent Decision of *K.R. vs. Anderson Community School Corporation* decided by the United States Court of Appeals for the Seventh Circuit on April 12, 1996, a copy of the Decision is enclosed. In this Decision, the Circuit Court held that a school district has discretion in providing benefits to students voluntarily attending private school. In particular, the Court held that the public school is not required to provide an instructional assistant to a disabled child in a private school where the school has given the child a genuine opportunity to participate in IDEA benefits by receiving an instructional assistant in the public school. The Court's Decision is grounded in the statutory of the IDEA and the regulations promulgated thereunder. The facts of this case are strikingly similar to our case. I respectfully request that copies of this Decision along with this letter be disseminated to the panel and its staff.

Sincerely yours,

/s/ Stephen F. Bailly
Stephen F. Bailly

SFB:jn
cc: Nancy Maurer, Esq.
Jay Worona, Esq.

Supreme Court, U.S.
FILED
JUN 24 1997
CLERK

No. 96-776

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL DISTRICT OF THE
CITY OF WATERVLIET, NEW YORK,
Petitioner,

-v-

COLLEEN RUSSMAN, A CHILD WITH
DISABILITIES, BY HER PARENTS,
PATRICIA AND PAUL RUSSMAN,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent, Colleen Russman, submits this supplemental brief in response to the brief of the United States as Amicus Curiae in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), *petition for cert. pending*, No. 96-323 (filed Aug. 25, 1996). The United States expresses its views on the impact of the Individuals with Disabilities Act Amendments of 1997 (IDEA Amendments Act) on the rights of private school children with disabilities[1] to receive publicly funded special education supportive services, and consequently on the petitions for certiorari pending in *K.R. v. Anderson* as well as in *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *petition for cert. pending sub nom. Board of Educ. v. Russman*, No. 96-776 (filed Nov. 18, 1996), and *Fowler v. Unified School District No. 259*, 107 F.3d 797 (10th Cir. 1997), *petition for cert. pending*, No. 96-1633 (filed Apr. 14, 1997).

The United States asserts that the Individuals with Disabilities Education Act (IDEA) as amended by the IDEA Amendments Act limits school districts' mandate to assist private school children with disabilities to a proportional amount of federal funds. (United States brief at 8). The United States further suggests that the decision of the Court of Appeals in *Russman* is inconsistent with the IDEA as amended and should, therefore, be remanded.[2] (United States brief at 14)

---

[1] Unless otherwise noted, "private school children with disabilities" refers to children enrolled voluntarily by their parents in private school as distinguished from children placed by school districts.

[2] The United States Court of Appeals held in *Russman* that the IDEA and regulations require that necessary services be provided to private school children in accordance with their needs, and that on-site assistance may be denied at a private school only when it would be "significantly more expensive" than providing the same service at public school. (P. App. A at 14a) The United States also proposes that *Fowler* be remanded. The court in *Fowler*, like *Russman*, recognizes the rights of pupils with disabilities in private schools to receive IDEA services, at least where the

The respondent disagrees. The interpretation of the IDEA amendments put forth by the United States cannot be reconciled with States' continuing obligations under the IDEA to address the individual needs of all children with disabilities, including children voluntarily placed in private schools, and to use federal funds to supplement, rather than supplant, the use of state and local funds. Regardless of the position of the United States, however, the IDEA Amendments Act should have no bearing on this Court's review of the petition for certiorari in *Russman*.

1. THE IDEA AMENDMENTS ACT OF 1997 OBLIGATES SCHOOL DISTRICTS TO PROVIDE SERVICES TO CHILDREN WITH DISABILITIES ATTENDING PRIVATE SCHOOL.

The IDEA Amendments Act leaves unchanged the requirement that for children with disabilities enrolled by their parents in private school, "provision is made for the participation of those children in the program assisted or carried out under [Part B] by providing for such children special education and related services...". IDEA (as amended) §612(a)(10)(A). The IDEA Amendments Act of 1997 adds, however, that the "[a]mounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part." IDEA (as amended) §612(a)(10)(A)(i)(I). The IDEA Amendments Act further states that "services may be provided to children with disabilities on the premises of private, including parochial, schools to the extent consistent with law." IDEA (as amended) §612(a)(10)(A)(i)(II).

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provision of such services would be no more costly than the same service provided in the public school. *Fowler*, 107 F.3d 797, 807-808.

The United States concedes that the IDEA as amended requires some benefits be provided to private school students. (United States brief at 3). But, the United States argues that the IDEA obligates school districts to provide such benefits only to the extent of a proportional share of federal funds received under Part B. In other words, state and local funds need not be applied to meet the needs of some children with disabilities. Children attending private schools may be excluded. Since federal funds, as currently appropriated, constitute only six to eight percent of the cost of educating a child with disabilities, only the most minimal needs can be met. Thus, the United States reasons, *K.R.*'s claim for individual services, and presumably the claims of many other children with disabilities attending or seeking to attend private school, are effectively moot. (United States brief at 11).

The respondent disagrees that the IDEA as amended so limits a school district's responsibility to provide special education and related services to private school children with disabilities. At best, the IDEA Amendments Act is ambiguous as to funding source, but not as to the nature of services required. While the IDEA clarifies that school districts must use a proportional amount of federal funds for services to children attending private schools, the Act itself is silent as to the specific use of state and local resources to meet this obligation to private school students. Had it been the specific intent of Congress to severely limit services to private school students with disabilities, or to waive any required application of state and local funding for providing services, the IDEA Amendments Act could have stated so unequivocally.

a. The position of the United States is inconsistent with the overall purpose of the IDEA as well as with several of its provisions as amended.

The interpretation of IDEA (as amended) §612(a)(10)(A) offered by the United States is inconsistent with the findings

and purposes of the IDEA as a whole which stress access to educational assistance and equality of opportunity for *all* children with disabilities. It is also inconsistent with other specific provisions of the IDEA as amended.

For example, in amending the IDEA, Congress found in part:

> While States, local educational agencies, and educational service agencies are responsible for providing an education for *all children with disabilities*, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law. IDEA (as amended) §601(c)(6) (emphasis added)

The stated purposes of the IDEA as amended further include the following:

> (1) (A) to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of *all* children with disabilities; . . . IDEA (as amended) §601(d) (emphasis added)

Thus, in defining the goals and purposes of the IDEA, Congress makes no distinctions between public and private school students with disabilities.

The interpretation of Section 612(a)(10)(A) urged by the United States is also incompatible with other IDEA eligibility requirements contained in Section 612. For example, for a State to be eligible for assistance under Part B of the IDEA, the State must have in effect policies and procedures to ensure a "free and appropriate public education is available to *all* children with disabilities. . ." IDEA (as amended) §612(a)(1)(A) (emphasis added). Further,"[t]he State has established a goal of providing full educational opportunity to *all* children with disabilities. . ." IDEA (as amended) §612(a)(2) (emphasis added). Significantly, although the IDEA contains a "LIMITATION" provision which limits the obligation to provide a free appropriate public education in some instances, there is no mention of privately placed children with disabilities in that provision. IDEA (as amended) §612(a)(1)(B).[3]

Children attending private schools are specifically included in the States' "Child Find" obligations:

> All children with disabilities residing in the State, *including children with disabilities attending private schools*, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated and a practical method is developed and implemented to determine which children with disabilities are

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[3] The IDEA Amendments Act limits the obligation of school districts to make a free appropriate public education available with respect to children aged 3-5 and 18-21 where inconsistent with state law or practice, and to incarcerated 18-21 year olds who were not identified prior to incarceration in adult prisons. IDEA (as amended) §612(a)(1)(B).

> currently receiving needed special education and related services. IDEA (as amended) §612(a)(3)(A) (emphasis added). (See also, IDEA (as amended) §612(a)(10)(A)(ii)).

Moreover, an individualized education program must be developed "for each child with a disability". IDEA (as amended) §612(a)(4). These provisions cannot be reconciled with the United States' interpretation of Section 612(a)(10)(A). It is contradictory to require states to provide full educational opportunity for all children with disabilities, and to identify, evaluate and develop individualized education programs for all children with disabilities, including private school children, if the states do not then actually provide the necessary services.

Finally, the very purpose of IDEA funding is to assist rather than supplant the states in meeting the educational needs of all children with disabilities. The section of the IDEA addressing services to private school children with disabilities specifically states that provision be made for the participation of children "*assisted* or carried out under this part..." IDEA (as amended) 612(a)(10)(A)(emphasis added). The United States' interpretation of 612(a)(10)(A), insofar as it totally supplants the use of state and local funding, cannot be reconciled with the requirements that the states supplement rather than supplant their use of state and local funds for the provision of services to all children with disabilities. Section 612(a)(18)(C) specifically prohibits supplantation:

> [F]unds paid to a State under this part will be used to supplement the level of Federal, State, and local funds...expended for special education and related services provided to children with disabilities under this part and *in no case to supplant* such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all

> children with disabilities have available to them a free appropriate public education . . . IDEA (as amended) §612(a)(18)(C) (emphasis added).

b. The application of the IDEA Amendments Act as proposed by the United States is inconsistent with the Americans with Disabilities Act and the Rehabilitation Act of 1973.

The United States fails to consider the Americans with Disabilities Act and other prohibitions against discrimination based on disability in its analysis. The Americans with Disabilities Act provides:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity. 42 U.S.C. §12131.

Regulations promulgated by the United States Department of Justice clarify that a public entity may not:

> [p]rovide a qualifed individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. §130.

Similarly, Section 504 of the Rehabilitation Act provides:

> "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. §794.

Under the United States' proposed analysis, school districts are encouraged to deny services in private schools to students with severe disabilities based on cost. Thus, private school children with disabilities who are otherwise qualified to participate in the benefits of the IDEA and state special education programs, may, nevertheless, be denied such benefits by reason of their disabilities in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131-12134, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

c. The effect of the IDEA Amendments, as interpreted by the United States, will be to deny children with disabilities the choice of attending private schools.

The United States argues that the high cost of meeting the needs of private school children with disabilities is incentive for states to withdraw from the IDEA altogether. This analysis is flawed. In the present case for example, the Watervliet School District saved no money by denying Colleen Russman necessary supportive services at the private school selected by her parents. Since Colleen was unable to benefit from her private school program without school district assistance, she was forced to forego her choice of a private school altogether and enroll in the public school. This result, the Court of Appeals notes, is inconsistent with the IDEA. (P. App. A at 16a). The school district ended up expending the same amount of money on identical services in the public school as it would have at the private school.[4]

Finally, where, as here, denial of services to a child with disabilities precludes a child's attendance at a parochial school,

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[4] The Court of Appeals noted that the Watervliet school district did not claim that it would cost significantly more to provide services to Colleen at the private rather than the public school. (P. App. A at 15a).

then the child's and family's right to freely exercise religious choice under the First Amendment to the United States Constitution is also implicated. See e.g., *Pierce v. Society of Sisters of the Holy Names*, 268 U.S. 510 (1925); *Sherbert v. Verner*, 374 U.S. 398 (1963).

2. THE IDEA AMENDMENTS ACT OF 1997 SHOULD HAVE NO EFFECT ON THIS COURT'S REVIEW OF THE PETITION FOR CERTIORARI IN *WATERVLIET v. RUSSMAN.*

The United States argues that even if the Second Circuit decision in *Russman* was justified under the IDEA, 20 U.S.C. §1413(a)(4)(A), prior to amendment, it now conflicts with the IDEA Amendments Act of 1997. The Amendments Act should have no impact, however, on the issues presented in *Russman*. As discussed in respondent's brief in opposition, petitioner Watervliet School District conceded in open court below the only issue it seeks to review. The school district agreed that it was required to provide on-site assistance to children with disabilities attending private schools, and that it would have provided a teaching aide and consultant teacher to Colleen Russman had she elected to attend a non-sectarian private school. (R. App. B at 5ra-7ra). As the United States Court of Appeals for the Second Circuit observed, the only reason offered by the school district for denying services to Colleen Russman was its view that such assistance would be precluded by the Establishment Clause of the First Amendment. (P. App A at 15a-16a). The Second Circuit held that the Establishment Clause does not bar such services; and the petitioner school district does not challenge this holding. In short, the reauthorization of the IDEA does not alter the question of whether the district should be able to raise in the Supreme Court, a defense it previously waived in the United Stated Court of Appeals.

The IDEA Amendments Act does indeed clarify that on-site assistance to children with disabilities is permitted including at parochial schools 612(a)(10)(A)(i)(II).[5] Thus, to the extent that the IDEA amendments specifically permit on site services at parochial schools, there is again no reason to review the decision below. A remand will not change the outcome for the parties in this case, but will lead to several years of additional litigation, ultimately with the same result.

CONCLUSION

For reasons stated above and in Respondents Brief in Opposition, the decision of the United Stated Court of Appeals for the Second Circuit in *Board of Ed. v. Russman* should stand and the petition for certiorari should be denied.

Respectfully submitted,

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[5] It was intent of Congress to codify the decision of *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) by explicitly allowing on-site assistance at private schools. H.R. Rep. No. 95, 105th Cong., 1st Sess. 93 (1997).

Appendix

APPENDIX A

Statutory and Regulatory Provisions:

Individuals With Disabilities Act, as amended by the Individuals With Disabilities Act Amendments of 1997 (to be codified at 20 U.S.C. 1400 *et seq.* (Supp. 1997)):

§601(c) FINDINGS

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

§601(d) PURPOSES- The purposes of this title are--

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, education service agencies, and Federal agencies to provide for the education of all children with disabilities.

§612 STATE ELIGIBILITY

(a)(1) FREE APPROPRIATE PUBLIC EDUCATION

(A) IN GENERAL - A free appropriate public education is available to all children with disabilities residing in the State between the ages 3 and 21, inclusive,

including children with disabilities who have been suspended or expelled from school.

(B) LIMITATION - The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children--

(i) aged 3 through 5 and 18 through 21 in a state to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this part be provided to children with disabilities who were not actually identified as being a child with a disability under section 602(3) immediately prior to their incarceration in adult prisons.

§612(a)(2) FULL EDUCATIONAL OPPORTUNITY GOAL-

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

§612(a)(3) CHILD FIND-

(A) IN GENERAL- All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and

implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) CONSTRUCTION- Nothing in this Act requires that children be classified by their disability so long as each child who has a disability listed in section 602 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part.

§612(a)(4) INDIVIDUALIZED EDUCATIONAL PROGRAM-

An individualized educational program, or an individualized family service plan that meets the requirements of section 636(d), is developed, reviewed, and revised for each child with a disability in accordance with section 614(d).

§612(a)(10) CHILDREN IN PRIVATE SCHOOLS-

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS-

(i) IN GENERAL-To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) CHILD-FIND REQUIREMENT-The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial elementary and secondary schools.

§612(a)(18) SUPPLEMENTATION OF STATE, LOCAL, AND OTHER FEDERAL FUNDS

(A) EXPENDITURES- Funds paid to a State under this part will be expended in accordance with all the provisions of this part.

(B) PROHIBITION AGAINST COMMINGLING- Funds paid to a State under this part will not be commingled with State funds.

(C) PROHIBITION AGAINST SUPPLANTATION AND CONDITIONS FOR WAIVER BY SECRETARY- Except as provided in section 613, funds paid to a State under this part will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and

convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.